Supreme Court, U.S.
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In The

Supreme Court of the United States

PROFESSIONAL DIVERS OF NEW ORLEANS,

Petitioner,

v.

DOUGLAS WISNER,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI FILED BY PETITIONER, PROFESSIONAL DIVERS OF NEW ORLEANS

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QUESTION PRESENTED

Can a claimant be considered a Jones Act seaman under a "totality of the circumstances" test, if he has no connection to a vessel or an identifiable fleet of vessels?

PARTIES TO THE ACTION

PLAINTIFF/RESPONDENT:

Douglas C. Wisner

DEFENDANT/PETITIONER:

Professional Divers of New Orleans

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The decision of the Louisiana Supreme Court dated March 2, 1999 is reported at 1999 WL 105335,[1] and is reproduced in the Appendix (Pet.App.) to this Petition for Writ of Certiorari at Pet.App. 1-13. The unreported decision of the trial court, the Twenty-Fifth Judicial District Court, Parish of Plaquemines, State of Louisiana, dated July 24, 1997, is reproduced in the Appendix to this Petition at Pet.App. 14-15, and that court's Reasons for Judgment, dated July 25, 1997, are reproduced in the Appendix at Pet.App. 16-18. The decision of the intermediate court, the Court of Appeal, Fourth Circuit, State of Louisiana, dated April 29, 1998, is reported at 714 So.2d 787 and is reproduced in the Appendix to this Petition at Pet.App. 19-27. The denial of Respondent, Douglas Wisner's, Request for Rehearing to the Court of Appeal, Fourth Circuit, State of Louisiana, dated May 29, 1998 is unreported and is reproduced in the Appendix to this Petition at Pet.App. 28.

STATEMENT OF JURISDICTION

The judgment of the Louisiana Supreme Court was issued on March 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

[1] As of the date of printing, this opinion had not yet been reported in the Southern Second Reporter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

That portion of the United States Constitution which is applicable herein is U.S. CONST. art. VI, cl.2., and is reproduced in the Appendix attached to this Petition at Pet.App. 29. The statute involved in this case is 46 U.S.C. §688(a), the "Jones Act", and is reproduced in the Appendix at Pet.App. 29-30.

STATEMENT OF THE CASE

1. Procedural History of the Case.

Douglas Wisner, (hereafter "Wisner"), respondent herein, was an employee of Professional Divers of New Orleans (hereafter "Professional Divers"), applicant herein, and brought suit in the Louisiana Civil District Court alleging that he is entitled to seaman status by virtue of 46 U.S.C. §688(a), (the "Jones Act"). The suit was filed in May of 1994. On June 11, 1997, Professional Divers moved for summary judgment, alleging that under the controlling state and federal law Wisner was not a Jones Act seaman, but rather, a maritime worker whose compensation remedies lie with the Longshore and Harbor Workers Compensation Act. (Pet.App. 31-153).[2]

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[2] Pet.App. 31-153 contains the Motion for Summary Judgment, pp. 31-32; the Memorandum in Support of the Motion for Summary Judgment, pp. 33-45; Exhibit B, the affidavit of Larry Tomlinson which was attached to the Motion for Summary Judgment, pp. 46-48; and Exhibit C, the deposition of Douglas Wisner, which was also attached to the Motion for Summary Judgment, pp. 49-153. One exhibit to the Motion for

Professional Divers asserted that it was entitled to summary judgment as a matter of law because Wisner simply could not prove the requisite connection to a vessel or identifiable group of vessels under common ownership or control for seaman status.

The trial court heard Professional Divers' motion for summary judgment on July 10, 1997, and subsequently granted the motion on July 24, 1997. (Pet.App. 14-15). In written reasons for judgment, the court found that Wisner could not show a substantial connection to a vessel or fleet of vessels under some degree of common ownership or control, as required to prove seaman status. (Pet.App. 16-18).

On August 14, 1997, Wisner appealed this ruling to the Court of Appeal, Fourth Circuit, State of Louisiana. On April 29, 1998, the court of appeal affirmed the trial court judgment. (Pet.App. 19-27; also reported at *Wisner v. Prof. Divers of New Orleans*, 97-2559, (La. App. 4 Cir. 4/29/98); 714 So.2d 787 *reh'g denied* 5/29/98). The court of appeal rejected Wisner's argument for seaman status based on his alleged connection to a fleet or the nature of his work as a diver. Specifically, the court considered the controlling test for seaman status set out in *Harbor Tug and Barge Co. v. Papai*, ___ U.S. ___, 117 S.Ct. 1535, 137 L.Ed.2d 800, (1997) and concluded that Wisner was not a master or a member of a crew of any vessel, and that he

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Summary Judgment could not be reproduced with typeset for this Court and, is therefore, contained in the record for lodging with this Court. That exhibit was the payroll record of Wisner, and was attached to the Motion for Summary Judgment as Exhibit A.

failed to prove any connection to any vessel or fleet of vessels under a degree of common ownership or control. (Pet.App. 27).

Wisner requested a rehearing on May 13, 1998 which the Court of Appeal, Fourth Circuit, State of Louisiana, denied on May 29, 1998. (Pet.App. 28). Wisner then filed his Application for Supervisory Writ of Certiorari with the highest court of this state, the Louisiana Supreme Court. The Louisiana Supreme Court issued its opinion on March 2, 1999 and formulated its own "totality of the circumstances" test, rather than applying the current test of whether the vessels that Wisner worked from were subject to common ownership and control, and consequently found that Wisner was a Jones Act seaman. (Pet.App. 1-13).

This Petition is filed because the analysis involved in determining whether one is a Jones Act seaman is now well-settled; however, despite the existence of this jurisprudence, the Louisiana Supreme Court formulated its own, new test for Jones Act seaman status contrary to *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995) and *Harbor Tug and Barge Co. v. Papai*, ___ U.S. ___, 117 S.Ct. 1535, 137 L.Ed.2d 800 (1997). The outcome-based test formulated by the Louisiana Supreme Court now allows virtually anyone whose duties are sea-based to qualify for seaman status. Professional Divers asserts that Wisner's remedies lie within the auspices of the Longshore and Harbor Workers' Compensation Act and not the Jones Act, since Wisner does not qualify as a Jones Act seaman.

2. Factual Background of the Case.

Wisner was employed at the time of his alleged injury by Professional Divers, and was working aboard Exxon's fixed platform, WD-73, performing diving operations. This platform was located in the West Delta region at block 73-A. This is beyond the three mile boundary for the State of Louisiana. The diving operations were performed pursuant to a contract between Professional Divers and Dolphin Company who had previously contracted with Chevron U.S.A. to perform said work.

On January 15, 1994, while working on this fixed platform, Wisner suited up as a stand-by diver and made one dive to a depth of 157 feet. (Pet.App. 83, 86, 119, 120). On the following day, January 16, 1994, approximately 21 hours later, Wisner began have dizzy spells and shortness of breath and went through a decompression test. (Pet.App. 127). After this test was completed, Wisner was flown back to shore via helicopter. (Pet.App. 131). Wisner eventually sought treatment with the Jo Ellen Smith Medical Center and developed a rapid heart rhythm.[3] (Pet.App. 133). Wisner was thereafter treated for an atrial flutter/tachycardia.

Wisner began gainful employment with other employers beginning in May or June of 1994, and in January of 1995 became a remote operated vehicle (ROV)

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[3] Wisner had previously had surgery in 1969 to repair an atrial septic defect which caused a heart murmur, (Pet.App. 64), and in 1988 experienced tachycardia. (Pet.App. 69).

pilot and technician under the direction of the engineering departments of various nuclear power plants. (Pet.App. 54, 58-59).

ARGUMENT

Can a claimant be considered a Jones Act seaman under a "totality of the circumstances" test, if he has no connection to a vessel or an identifiable fleet of vessels?

This case arises under the Jones Act, 33 U.S.C. §688(a), which provides compensation and medical benefits to one who is injured while employed as a member of the crew of a vessel. But, not all employees who are injured aboard vessels are considered to be Jones Act seamen. In *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314 (1995), this Court held, in pertinent part, that the essential requirements to qualify for seaman status under the Jones Act are twofold:

> (1) The workers' duties must contribute to the function of the vessel or to the accomplishment of its mission, *and*
>
> (2) The worker must have a connection to a vessel in navigation, or to an identifiable group of vessels that is substantial in both duration and nature.

The issue in the instant case centers around this second requirement of *Chandris*; more specifically, in order to be considered a Jones Act seaman, Wisner had to show that he had a connection to a vessel or identifiable fleet of vessels that was substantial in both duration and nature. Under the current state of the law, Wisner failed

to meet his burden because he had no connection to either a vessel or an identifiable fleet of vessels. However, the Louisiana Supreme Court found that Wisner could meet his burden by satisfying a different test than the one currently existing and recently put forth by this Court in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995), and *Harbor Tug and Barge Co. v. Papai*, ___ U.S. ___, 117 S.Ct. 1535, 137 L.Ed.2d 800 (1997). The Louisiana Supreme Court ignored *Chandris* and *Papai*, fashioned its own test, and found that Wisner was a Jones Act seaman because his duties as a commercial diver subjected him to the perils of the sea.

As noted above, the *Chandris* Court stated the two-part test used to determine seaman status, and the second prong of that test requires that a worker have a substantial connection to a vessel or identifiable fleet of vessels. *Chandris*, 115 S.Ct., at 2190. Here, it is undisputed that Wisner was not on a vessel at the time he was injured, and that he had no permanent attachment to any particular vessel. During his 48 days (over a span of two years) with Professional Divers, Wisner worked off of fixed platforms approximately 10% of his time, and spent the other 90% aboard 14 different vessels owned by 12 different companies. Consequently, Wisner had no connection to a particular vessel in navigation that was substantial in duration or nature. Since Wisner had no connection to a particular vessel in navigation, the question was whether Wisner had a connection to an identifiable fleet of vessels.

In order for a seaman to be connected to an identifiable fleet of vessels, that fleet must be subject to common ownership and control. *Harbor Tug and Barge Co. v. Papai*, ___ U.S. ___, 117 S.Ct. 1535, 137 L.Ed.2d 800 (1997).

Importantly, this Court granted certiorari in *Papai* to clarify its decision in *Chandris* by setting forth a clear definition of what constitutes an identifiable fleet of vessels because that definition had "been subject to differing interpretations, and we seek to provide clarification." *Papai*, 117 S.Ct., at 1538.

In *Papai*, the plaintiff found work through the union hiring hall and had short-term jobs with various vessels for two and one-half years – most of it deckhand work. On the day he was injured, the plaintiff was sent to Harbor Tug to paint a housing structure on the tug Pt. Barrow, a vessel in navigation. This Court found that although the plaintiff was on a vessel at the time of his injury, he did not meet the second prong of *Chandris* for two reasons. First, plaintiff's work aboard the actual vessel "was the sort of 'transitory or sporadic' connection to a vessel or group of vessels that, as we explained in *Chandris*, does not qualify one for seaman status." *Papai*, 117 S.Ct., at 1542. Second, "there was no showing that the group of vessels the court sought to identify were subject to unitary ownership or control in any aspect of their business or operation. . . . The requisite link is not established by the mere use of the same hiring hall which draws from the same pool of employees." *Papai*, 117 S.Ct., at 1541.

"In deciding whether there is an identifiable group of vessels of relevance for a Jones Act seaman status determination, the question is whether the vessels are subject to common ownership or control." *Papai*, 117 S.Ct., at 1541. This Court cited its language in *Chandris* that an identifiable fleet of vessels must be "a finite group of vessels under common ownership or control. 515 U.S., at

366, 115 S.Ct., at 2189." *Papai*, 117 S.Ct., at 1541. This Court also reiterated that "*an important part of the test* for determining who is a seaman is whether the injured worker seeking coverage has a substantial connection to a vessel or a fleet of vessels, and the latter concept requires a requisite degree of common ownership or control." *Papai*, 117 S.Ct., at 1542-43 [Emphasis added].

In the instant case, however, the Louisiana Supreme Court did not even address whether the vessels which Wisner worked aboard were subject to a common ownership or control. In fact, the Louisiana Supreme Court flatly repudiated the "common ownership and control" test put forth in *Papai*, and held that since Wisner's job – that of commercial diver – subjects him to the perils of the sea, then he should, for that reason alone, be considered a Jones Act seaman. The Louisiana Supreme Court's decision summed up their view on the first page of their opinion as follows:

> After reviewing the record and applicable law, we reverse the lower courts' finding and hold that Jones Act coverage should not be withheld based upon the fact that the vessels upon which a diver works are not under his employer's common ownership and control. Because a commercial diver's duties continuously subject him to the perils of the sea, plaintiff is properly classified as a Jones Act seaman.
>
> (Pet.App. 1.)

The Louisiana Supreme Court has admittedly acknowledged that the test in *Papai* is not a valid test because the Court has formulated its *own* test under the auspices of excerpts taken from various jurisprudence.

The Louisiana Supreme Court held that the requirement that a claimant have a substantial connection to an identifiable fleet of vessels can be met by looking at the "totality of the circumstances" and not by looking at whether the fleet of vessels is subject to common ownership or control as required by *Papai*. Indeed, the Court did not even address whether the fourteen different vessels that Wisner worked aboard were subject to common ownership or control.

Wisner's connection, or lack thereof, to an identifiable fleet of vessels was instead met with the Louisiana Supreme Court's "totality of the circumstances" test. The court's use of a "totality of the circumstances" test is merely a subterfuge for their finding that a commercial diver is to be considered a Jones Act seaman on the sole basis that his job duties subject him to the perils of the sea. Indeed, the Court found that "it is the inherently maritime nature of the tasks performed and perils faced by Wisner as a commercial diver, perhaps the most precarious work at sea, and not the fortuity of his tenure on various vessels, that makes Wisner a seaman." This finding by the Louisiana Supreme Court is erroneous for three reasons.

First, it ignores the requirement that a court address whether vessels are under common ownership or control. As stated in *Papai*: "**[i]n deciding whether there is an identifiable group of vessels of relevance for a Jones Act seaman status determination, the question is whether the vessels are subject to common ownership and control.**" *Papai*, 117 S.Ct., at 1542-43.

Second, the finding by the Court that it is not the connection to a vessel, but "the tasks performed and the perils faced by Wisner as a commercial diver . . . that makes Wisner a seaman," is contrary to this Court's pronouncement that "**seaman status is not coextensive with seamen's risks.**" *Chandris, Inc. v. Latsis*, 515 U.S. 347, 361, 115 S.Ct. 2172, 2186, 132 L.Ed.2d 314 (1995).

Third, the finding that a commercial diver is a Jones Act seaman by virtue of his job description as a commercial diver is also contrary to this Court's pronouncements *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172, 2188, 132 L.Ed.2d 314 (1995), *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 89, 112 S.Ct. 486, 492, 116 L.Ed.2d 405 (1991), and *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 354, 111 S.Ct. 807, 817, 112 L.Ed.2d 866 (1991), wherein this Court stated that "**it is not the employee's particular job that is determinative, but the employee's connection to a vessel.**"

The Louisiana Supreme Court is intent on finding that commercial divers, regardless of their connection to a vessel, are entitled to automatic Jones Act seaman status. The Court repudiated the test in *Papai* by stating that a substantial connection is only *part* of the test. (Pet.App. 8). Professional Divers agrees that it is only part of the test. But, such semantics should not be used by a court to abrogate its duty to actually follow that part of the test. Moreover, the context of the quote from *Papai* contradicts the court's conclusion from it. The full quote contained in *Papai* is: "*An important part of the test* for determining who is a seaman is whether the injured worker seeking coverage has a substantial connection to a vessel or fleet of vessels, and the latter concept requires a requisite degree

of common ownership or control." *Papai*, 117 S.Ct. at 1543.

Notwithstanding this "important" part of the test, the Louisiana Supreme Court failed to discuss the fact that Wisner was not on a vessel at the time, and failed to discuss the "fleet of vessels" requirement. Instead, the court changed the focus to whether Wisner's duties were sea based, thus culminating in its own test for seaman status.

The opinion of the Louisiana Supreme Court is written by acknowledging a point of law and then reciting language, sometimes from the same case, to effectively destroy that law. For example, the Court first acknowledges that seaman status requires "more than a transitory connection with a vessel or a specific group of vessels," but then states that "the Fifth Circuit Court of Appeal has specifically noted that this requirement should not be given a 'wooden application', and has characterized the permanency requirement as being 'more frequently an analytical starting point than a self-executing formula.' " (Pet.App. 4). This type of forced rationale continues throughout the opinion.

The Louisiana Supreme Court addressed this Court's opinion in *Chandris* noting that: " . . . the court stated that a seaman's connection to a vessel in navigation, or to a group of such vessels, must be substantial in terms of both its duration and its nature." (Pet.App. 7). But, rather than apply this test to the instant case, the Louisiana Supreme Court relied on other language in *Chandris* to actually defeat this required analysis by stating "the

Chandris court poignantly stated that in defining the prerequisites for Jones Act coverage, one should focus upon the essence of what it means to be a seaman rather than allowing jurisprudential "tests" to obscure such a finding." (Pet.App. 7).

The Louisiana Supreme Court then acknowledged the rule of law set forth in *Papai*. (Pet.App. 7-8). But, again, it did not address whether the vessels that Wisner worked from constituted an identifiable fleet of vessels. Instead, the court stated that the *Papai* rule is only part of the test, and then just concludes that under *Papai* and *Chandris* the "totality of the circumstances" is the method for determining whether one has a substantial connection to a vessel or identifiable fleet of vessels. The following is the pertinent quote from that opinion.

> "The United States Supreme Court most recently explored the boundaries of Jones Act coverage in *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535 (1997). Relying on the principles set forth in *Chandris*, the court noted that a requisite degree of common ownership or control is required when determining if an injured worker has a substantial connection to a group of vessels. However, it is contended, as found in *Papai*, that a substantial connection to a vessel or fleet of vessels is *part* of the test for determining who is a seaman. *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. at 1542-43. This view is shared with the United States Supreme Court which found that 'the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon.' *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2190

> *citing Wallace v. Oceaneering Int'l*, 727 F.2d at 432."

(Pet.App. 8) (Emphasis in original).

The court used the excerpted language from the case of *Chandris*, which was PRIOR to the decision in *Papai*, to support its own abrogation of *Papai*. Here, Wisner did not have the requisite substantial connection to a vessel or identifiable fleet of vessels, as those terms are currently defined. The Louisiana Supreme Court has used excerpted language from *Chandris* to formulate a new Jones Act seaman status test. Now, when an employee who does not have a substantial connection to a vessel or fleet of vessels is injured at sea, he qualifies as a Jones Act seaman in Louisiana under the "totality of the circumstances" (i.e. his duties subject him to the perils of the sea).

Rather than outright repudiate the common ownership or control test as mandated by *Papai*, the Louisiana Supreme Court cites the 1984 U.S. Fifth Circuit case of *Wallace v. Oceaneering Int'l*, 727 F.2d 427 (5th Cir. 1984) for the proposition that a commercial diver should be considered a seaman because his duties alone subject him to the perils of the sea. The Louisiana Supreme Court recited an entire paragraph from that case which includes a vivid description of the diver's duties, and which for some reason, the court found pertinent in its inquiry here. Particularly telling of the mind set of the Louisiana Court is its inclusion of this dark description:

> A diver's work *necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land. . . .

> Moreover, when a diver descends from the surface, braving darkness, temperature, lack of oxygen, and high pressures, he embarks on a marine voyage in which his body is now the vessel.

(Pet.App. 6).

This language, while persuasive, is simply not pertinent in the inquiry of whether one has a substantial connection to an identifiable fleet of vessels. As it stands now, when Jones Act litigation arises in Louisiana,[4] the ONLY issue to be resolved is whether his duties were "sea-based." **The Louisiana Supreme Court held that " . . . when we determine whether the nature of the connection to a vessel is substantial, we focus on whether his duties were sea-based."** (Pet.App. 8). **The court did not address, much less adopt or follow the existing precedent set forth by this Court to determine the substantial connection that an employee has with a vessel or fleet of vessels.**

The Louisiana Supreme Court has violated its Sixth Amendment duty by disregarding the mandates of federal law *and* by expanding federal law to find that a commercial diver is a Jones Act seaman, by virtue of his job description alone, even though he has no connection to a vessel or an identifiable fleet of vessels. U.S.CONST. art. VI, cl.2.

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[4] Louisiana is located in an area which quite possibly sees the most Jones Act litigation in the nation. This Court noted in *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2188 that the United States Court of Appeals for the Fifth Circuit, in which jurisdiction Louisiana sits, has a "substantial Jones Act caseload."

Professional Divers respectfully requests that this Court grant the instant Petition for Writ of Certiorari because the current jurisprudence from the Louisiana Supreme Court ignores the existing test to determine Jones Act seaman status, establish a new test, and under that test, virtually all of those who have sea-based duties will now be considered Jones Act seamen regardless of their connection, or lack of connection, to a vessel or identifiable fleet of vessels.

Respectfully submitted,

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SUPREME COURT OF LOUISIANA

98-C-1755

DOUGLAS WISNER

(MAR 2 1999)

versus

PROFESSIONAL DIVERS OF NEW ORLEANS

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF PLAQUEMINES

TRAYLOR, Justice*

We granted this writ to determine if a commercial diver, whose employment placed him on vessels for ninety percent of his work life, is a seaman and thus entitled to Jones Act coverage. After reviewing the record and applicable law, we reverse the lower courts' finding and hold that Jones Act coverage should not be withheld based upon the fact that the vessels upon which a diver works are not under his employer's common ownership and control. Because a commercial diver's duties continuously subject him to the perils of the sea, plaintiff is properly classified as a Jones Act seaman.

FACTS AND PROCEDURAL HISTORY

On January 15, 1994, Douglas C. Wisner (Wisner), a commercial diver by trade, was employed by Professional Divers of New Orleans, Inc. (PDNO) installing anodes on platforms and repairing pipelines while working aboard Exxon's fixed platform seventy-three in the West Delta region of the Gulf of Mexico. However, approximately

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* VICTORY, J., not on panel, *See* Rule IV, Part 2, § 3.

twenty-one hours after making a dive of 165 feet, Wisner began to feel light headed and out of breath. On January 16, 1994, Wisner was flown to shore and subsequently sought medical attention at Jo Ellen Smith Regional Medical Center in New Orleans. After receiving hyperbaric treatment, Wisner was admitted to the hospital and later treated for tachycardia, which developed while he was in the hospital.

Wisner worked for PDNO as a diver from November 1992 until January 1994. In the course of his employment, Wisner was assigned to numerous jobs, ten percent (10%) of which required him to work off of fixed platforms and ninety percent (90%) of which required him to work from vessels. With the exception of the job at issue, Wisner slept and ate on the vessels from which he was diving. Wisner worked on approximately fourteen different vessels owned by twelve different companies while employed by PDNO.

In May 1994, Wisner filed his original petition alleging that he was a Jones Act seaman employed by PDNO at the time of his injury. PDNO then moved for summary judgment, alleging that Wisner was not a Jones Act seaman, but rather, a maritime worker who should be compensated under the Longshore and Harbor Workers Compensation Act. The trial court found that Wisner did not have a substantial connection to a vessel or fleet of vessels under some degree of common ownership or control and thus granted PDNO summary judgment, which was later affirmed by the court of appeal. Because we find Wisner faced regular exposure to the perils of the sea as a Jones Act seaman, we now reverse.

LAW AND DISCUSSION

A major body of seaman status law developed in the Court of Appeals for the Fifth Circuit in the wake of *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). *See, Chandris, Inc. v. Latsis*, 115 S.Ct. 2172 (1995). At the time of his injury, Robison was an oil worker permanently assigned to a drilling rig mounted on a barge in the Gulf of Mexico. In sustaining the jury's award of damages to Robison under the Jones Act, the court held as follows:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips. *Offshore Co. v. Robison*, 266 F.2d at 779 (footnote omitted).

The first prong of the *Robison* test has both a permanency requirement and a substantiality requirement. In order to fulfill the permanency requirement, a claimant must have "more than a transitory connection" with a vessel or a specific group of vessels. *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 326 (5th Cir. 1977); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed.2d 212 (1984). The court's focus in this regard is "meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights

merely because he serves aboard a vessel for a relatively short period of time." *Porche v. Gulf Mississippi Marine Corp.*, 390 F.Supp. 624, 631 (E.D.La. 1975); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d at 247; *Buras v. Commercial Testing & Eng'g Co.*, 736 F.2d 307, 310 (5th Cir. 1984). The Fifth Circuit Court of Appeal has specifically noted that this requirement should not be given a "wooden application," *Brown v. ITT Rayonier, Inc.*, 497 F.2d 234, 237 (5th Cir. 1974), and has characterized the permanency requirement as being "more frequently an analytical starting point than a self-executing formula." *Brown v. ITT Rayonier, Inc.*, 497 F.2d at 237; *Buras v. Commercial Testing & Eng'g Co.*, 736 F.2d at 310. For a claimant to satisfy the substantial work requirement of *Robison*, "it must be shown that he performed a significant part of his work aboard the vessel with at least some degree of regularity and continuity." *Barrios v. Engine & Gas Compressor Services, Inc.*, 669 F.2d 350, 353 (5th Cir. 1982); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d at 246. Since *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986), the Fifth Circuit has consistently analyzed the problem in terms of the percentage of work performed on vessels for the employer in question, and has declined to find seaman status where the employee spends less than 30 percent of his time aboard ship. *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172, 2189 (1995). The substantial connection requirement may be used to distinguish between sea-based employees and land-based employees, as land-based employment is inconsistent with Jones Act coverage. *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535, 1542-43 (1997).

The second prong of the *Robison* two-part test for determining seaman status under the Jones Act, that an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission, is easily met. The United States Supreme Court has noted in both *McDermott Int'l, Inc. v. Wilander,* 111 S.Ct. 807, 817, and *Chandris* that it is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel. Rather, a seaman must be doing the ship's work. *Chandris, Inc. v. Latsis,* 115 S.Ct. at 2184. Although this element is not disputed in the case at hand, seaman status is not so easily deciphered, as the jurisprudential interpretation of a seaman encompasses several factors, none of which is conclusive. *See, e.g., Bertrand v. International Mooring & Marine, Inc.,* 700 F.2d at 246 (while the fact that a claimant's work places him on several different vessels does not preclude seaman status, it is relevant in making that determination).

The principle developed in *Bertrand* and *Buras,* that determination of seaman status should not be controlled by an employer's chartering arrangement, was later used in *Wallace v. Oceaneering Int'l,* 727 F.2d 427 (5th Cir. 1984), to hold that a commercial diver has the legal protections of a seaman when a substantial part of his duties are performed on vessels. *See, Bertrand v. International Mooring & Marine, Inc.,* 700 F.2d at 245; *Buras v. Commercial Testing & Eng'g Co.,* 736 F.2d at 312. The *Bertrand* court found Jones Act coverage should not be withheld because the vessels are not under the employer's common ownership or control, when claimants are continuously subjected to the perils of the sea and engaged in classical seaman's work. *Bertrand v. International Mooring &*

Marine, Inc., 700 F.2d at 245. The Fifth Circuit specifically held that, in light of the purposes of the Jones Act, employers will not be allowed to deny Jones Act coverage to seamen by arrangements with third parties regarding a vessel's operation or by the manner in which work is assigned. *Id.* With these principles in mind, the *Wallace* court found a commercial diver, who was employed with a diving service contractor for only several days at the time of his accident, to be a seaman. The court specifically held:

> A diver's work *necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land. It is not, like so many offshore field occupations, an art developed in land work and transposed to a maritime setting. Oil field divers who regularly spend days or weeks at a time working, eating, and sleeping on vessels are exposed to the same hazards as other seamen. Moreover, when a diver descends from the surface, braving darkness, temperature, lack of oxygen, and high pressures, he embarks on a marine voyage in which his body is now the vessel. Before he can complete his assigned task, he must successfully navigate the seas. *Wallace v. Oceaneering Int'l*, 727 F.2d at 436. (citations omitted)

After thirty-three years of silence, the United States Supreme Court in *McDermott Int'l, Inc. v. Wilander*, 111 S.Ct. 807 (1991), considered the question of seaman status and affirmed the *Robison* requirement that a worker's duties must contribute to the function of the vessel or the accomplishment of its mission. Wilson L. Maloz, III, *Harbor Tug & Barge Co. v. Papai: The United States Supreme Court Takes a Fleeting Glance at Jones Act Seaman Status*, 72

Tul. L.Rev. 2227 (1998). However, *Wilander* did not provide a complete definition of "seaman" in that it did not address the permanent connection aspect of the *Robison* test; it simply stated that an "employment-related connection" was required. *Id.* at 2231. The Supreme Court followed *Wilander* with a ruling in *Chandris, Inc. v. Latsis,* 115 S.Ct. 2172, that solidified the test for determining seaman status. In addition to affirming *Wilander,* the court stated that a seaman's connection to a vessel in navigation, or to a group of such vessels, must be substantial in terms of both its duration and its nature. The purpose of this provision was to ensure Jones Act coverage to true seamen, while precluding land-based workers who have only a transitory or sporadic connection to a vessel in navigation and, therefore, whose employment does not regularly expose them to the perils of the sea. *Chandris, Inc. v. Latsis,* 115 S.Ct. at 2190. The *Chandris* court poignantly stated that in defining the prerequisites for Jones Act coverage, one should focus upon the essence of what it means to be a seaman rather than allowing jurisprudential "tests" to obscure such a finding. In so doing, the court recommended that the total circumstances of an individual's employment be considered, as the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time. *Chandris, Inc. v. Latsis,* 115 S.Ct. at 2190-91.

The United States Supreme Court most recently explored the boundaries of Jones Act coverage in *Harbor Tug & Barge Co. v. Papai,* 117 S.Ct. 1535 (1997). Relying on the principles set forth in *Chandris,* the court noted that a

requisite degree of common ownership or control is required when determining if an injured worker has a substantial connection to a group of vessels. *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. at 1541. However, it is contended, as found in *Papai*, that a substantial connection to a vessel or fleet of vessels is a *part* of the test for determining who is a seaman. *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. at 1542-43. This view is shared with the United States Supreme Court which found that "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2190 *citing Wallace v. Oceaneering Int'l*, 727 F.2d at 432.

Papai and *Chandris* dictate that when we determine whether the nature of Wisner's connection to vessels in navigation is substantial, we should focus on whether Wisner's duties were primarily sea-based activities. *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. at 1540; *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2190-91; *Cabral v. Healy Tibbits Builders, Inc.*, 118 F.3d 1363, 1366 (9th Cir. 1997). In both cases, the Supreme Court emphasized that the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks. *Id.* In sum, the formulations or "tests" employed by the various courts are simply different ways to arrive at the same basic point: the Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to "the special hazards and disadvantages to which they who go to sea in ships are subjected." *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2190 *citing Seas*

Shipping Co. v. Sieracki, 328 U.S. 85, 104, 66 S.Ct. 872, 882, 90 L.Ed. 1099 (1946) (Stone, C.J., dissenting).

CONCLUSION

After a thorough consideration of the law and the "total circumstances" surrounding Wisner's employment with PDNO, this court holds that Wisner is a seaman under the Jones Act. Particularly persuasive is the fact that Wisner's work as a commercial diver placed him on vessels for ninety percent of his work-life with PDNO, during which time he slept and ate on such vessels. However, it is the inherently maritime nature of the tasks performed and perils faced by Wisner as a commercial diver, perhaps the most precarious work at sea, and not the fortuity of his tenure on various vessels, that makes Wisner a seaman. *Wallace v. Oceaneering Int'l*, 727 F.2d at 436. We reverse the trial court and court of appeal's finding of summary judgment in favor of PDNO, and hereby remand this case to the trial court for further proceedings consistent with this opinion.

SUPREME COURT OF LOUISIANA

No. 98-C-1755

DOUGLAS WISNER

(MAR 2 1999)

VERSUS

PROFESSIONAL DIVERS OF NEW ORLEANS

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF PLAQUEMINES

Calogero, C. J. concurring

I concur because I believe that this plaintiff is a Jones Act seaman. His job as a commercial diver continuously subjects him to the perils of the sea, and I say this notwithstanding that his employer is neither the owner nor charterer of the vessels on which he performs his work.

The requirement that a Jones Act seaman have a substantial connection with a vessel is "to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535, 1540 (1997). *Papai's* focus on common ownership with regard to an identifiable group of vessels arose out of the fact that the *Papai* plaintiff's employment did not include any seagoing activity; he was hired for one day to paint a vessel, dockside. The Court specifically left for another day consideration of the case where an employee was hired to

perform seagoing work during the employment in question. *Id.* at 1542. Consequently, *Papai* is not controlling for purposes of the instant case.

The Fifth Circuit Court of Appeals in *Bertrand v. International Mooring & Marine Inc.*, 700 F.2d 240, 245 (5th Cir. 1983), however, has rejected the proposition that an employee who is continuously subjected to the perils of the sea should be denied Jones Act protection merely because the several vessels upon which he works are not under his employer's common ownership or control. In so holding, the court recognized that the "group of vessels" concept has been used to expand coverage under the Jones Act, not to restrict it. *Id.* In the instant case, the plaintiff's work as a commercial diver placed him on vessels for ninety percent of his work life with his employer, during which time he slept and ate on the vessels and was routinely exposed to the perils of the sea. As the majority notes, it is the inherent maritime nature of his work which renders him properly classified as a Jones Act seamen. The fact that his employer did not have a relationship of ownership or control regarding the vessels on which he worked does not deprive him of that status.

SUPREME COURT OF LOUISIANA

No. 98-C-1755

DOUGLAS WISNER

(MAR 2 1999)

versus

PROFESSIONAL DIVERS OF NEW ORLEANS

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF PLAQUEMINES

KNOLL, JUSTICE, concurring

I concur to note that neither *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535 (U.S. 1997) nor *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) are controlling for purpose of the case sub judice. Instead, this case involves what the Papai Court ("This is not a case where the employee was hired to perform seagoing work during the employment in question, however brief, and we need not consider here the consequences of such an employment.") and the *Barrett* court ("we do not decide whether the same principle governs the crew member status of the maritime worker who spends virtually all of his time performing traditional seaman's duties – work closely related to the movements of vessels – but does his work on short voyages aboard a large number of vessels") left for another day: Whether an employee hired to preform [sic] seamen duties aboard a number of vessels during the employment in question qualifies for seamen status. *Papai* and *Barrett* were concerned with preventing employees hired to preform [sic] traditionally land-based activities, whose transitory and sporadic connection to a vessel only occasionally exposed them to the dangers of

the sea, from gaining seaman status. The distinction is that in those cases, the duties of the worker were not necessarily or inherently maritime in nature such that his presence on the vessel may be fortuitous. Whereas in the case before us, the plaintiff's duties are inherently maritime in nature and therefore routinely and necessarily exposed him to the perils of the sea. Accordingly, those cases are not controlling as to whether plaintiff has seamen's status.

When we look at the nature of the plaintiff's duties, where he performed them, and the extent to which he was exposed to maritime hazards, he easily satisfies the requirements of seaman status because he performed a substantial part of his work on a vessel, which work contributed to the function of the vessel. Plaintiff worked 90% of his time from vessels, and when he was on the vessels he would live there making them his home where he ate and slept. As a diver, the nature of his duties had to be spent offshore at sea as these cannot be preformed [sic] on land. His work involved the installing of anodes on platforms and repairing pipelines. Thus, when he was on the vessels, the diving services were essential to the completion of the vessel's operation and its movement from one spot to the next. It is the nature and location of their tasks and not any fortuity of their tenure on a vessel that makes divers, like the plaintiff, seamen.

TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NO. 38-407 **DIVISION "A"**

DOUGLAS WISNER
VERSUS
PROFESSIONAL DIVERS OF NEW ORLEANS

DATE FILED: JUL 24 1997

/s/ _____
DEPUTY CLERK

JUDGMENT

This matter came on for hearing on Professional Divers of New Orleans' Motion for Summary Judgment on July 10, 1997. There were present:

RICHARD S. VALE	Attorney for Defendant, Professional Divers of New Orleans
CONRAD WILLIAMS, III	Attorney for Plaintiff, Douglas C. Wisner

The Court considering the argument of counsel, the pleadings and for written reasons filed into the record renders judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED judgment is granted herein in favor of defendant, Professional Divers of New Orleans, finding that the plaintiff, Douglas C. Wisner, is not a Jones Act seaman for the reason that the vessels or identifiable group of vessels on

which he was employed were not under common ownership or control.

JUDGMENT RENDERED AND SIGNED this 24 day of July, 1997 at Pointe-a-la-Hache, Louisiana.

/s/ _____
JUDGE

TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NO. 38-407 DIVISION "A"

DOUGLAS WISNER
VERSUS
PROFESSIONAL DIVERS OF NEW ORLEANS

DATE FILED: JUL 25 1997

/s/ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

Defendant, Professional Divers of New Orleans, has filed a Motion for Summary Judgment claiming that the plaintiff, Douglas C. Wisner, is not a seaman within the meaning of the Jones Act. The facts are these:

Plaintiff was employed by Professional Divers of New Orleans as a diver. He was working aboard a fixed platform in Exxon's West Delta Region at Block 73. His work consisted generally of replacing certain anodes on the drilling rig as well as other repairs and refurbishing.

It appears that plaintiff worked for Professional Divers on and [sic] on-and-off basis for about 2 years prior to the accident sued upon. The daily work and diving sheets attached to defendant's Motion for Summary Judgment as Exhibit A indicate Mr. Wisner worked about 10% of his time on a fixed platform while spending 90% of his time working off of vessels. However, he worked on approximately 14 different vessels owned by at least 12 different companies. Plaintiff was never permanently assigned to any of the vessels.

Defendant relies on the recent U.S. Supreme Court case of *Harbor Tug and Barge Company v. Papai,* 117 S.Ct. 1535 (1997). There Papai had been employed by Harbor and Tug Barge Company on an off basis over a period of time. He was periodically hired out of a union hall and worked either as a maintenance man, a deck hand or a longshoreman. He claimed Jones Act seaman status which was opposed by the defendant. The District Court granted summary judgment in favor of defendant but it was reversed by the Ninth Circuit Court of Appeals. The Intermediate Appellate Court found that the relevant inquiry was not whether Papai had a permanent connection with the vessel but rather whether his relationship with a vessel or identifiable group of vessels was of substantial duration and nature thereby requiring consideration of the totality of the employment circumstances. The Court of Appeals found this to be a mixed question of law and fact, inappropriate for summary judgment. Justice Kennedy writing for a six member majority reversed the Court of Appeals and reinstated the judgment of the District Court stating that no reasonable jury could conclude plaintiff was a Jones Act seaman under the facts recited. Justice Kennedy wrote:

> Jones Act coverage is confined to seaman, those workers who fact regular exposure to the perils of the sea. An important part of the test for determining who is a seaman is whether the injured worker seeking coverage has a substantial connection to a vessel or a fleet of vessels, and the ***latter concept requires a requisite degree of common ownership or control***. Emphasis added.

Plaintiff has relied upon *Folse v. Western Atlas International, Inc.*, 593 So2d. 341 (La. 1992). This case held that if an employer uses its customers' vessels instead owning or chartering its own, this will constitutes [sic] a fleet. Plaintiff also relies upon *Hall v. Professional Divers of New Orleans*, 865 F.Supp. 363 (E.D. La. 1994) to the effect that vessel assignment is not dispositive in cases concerning commercial divers.

The Court finds that a professional diver is a worker who faces regular exposure to the perils of the sea. However, under the facts of the case before it, the Court is unable to conclude that the plaintiff has a substantial connection to a vessel or fleet of vessels under some degree of common ownership or control. It appears to this Court that the *Papai* case, *supra*, overrules the jurisprudence relied upon by plaintiff thereby undermines plaintiffs position in the motion for summary judgment.

Judgment accordingly.

Pointe-a-la-Hache, Louisiana this 25 day of July, 1997.

/s/ _____
JUDGE

DOUGLAS WISNER	*	NO. 97-CA-2559
VERSUS	*	COURT OF APPEAL
PROFESSIONAL DIVERS OF NEW ORLEANS	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

******

AN APPEAL FROM THE
25th JUDICIAL DISTRICT COURT,
PLAQUEMINES PARISH
NO. 38-407, DIVISION "A"
HONORABLE MICHAEL E. KIRBY, JUDGE

******

MIRIAM G. WALTZER
JUDGE

******

(Court composed of Judge Denis A. Barry, Judge Miriam G. Waltzer and Judge Moon Landrieu)

CONRAD S. P. WILLIAMS III
ST. MARTIN, LIRETTE & WILLIAMS
HOUMA, LA 70361-2017
-and-
JOSEPH W. WALKER
FRANKLIN, MOSELE & WALKER
HOUSTON, M TX 77027
ATTORNEYS FOR PLAINTIFF-APPELLANT

RICHARD S. VALE
BLUE WILLIAMS, L.L.P.
METAIRIE, LA 70002-3760
ATTORNEY FOR DEFENDANT-APPELLEE

AFFIRMED

Plaintiff contends that his employment with defendant as a diver entitles him to seaman status under the

Jones Act. The trial court granted defendant's summary judgment after determining that plaintiff was not a seaman.

FACTS

On 15 January 1994, plaintiff, Douglas Wisner, dove from a fixed platform, during his employment with defendant, Professional Divers of New Orleans, Inc. (PDNO). The platform was located beyond the three mile boundary for the State of Louisiana. Plaintiff performed diving operations pursuant to a contract between defendant and Dolphin Company, which had previously contracted with the platform's owner/operator.

On 16 January 1994, plaintiff developed symptoms of an injury, dizzy spells and shortness of breath. He sought and received treatment for an atrial flutter. Plaintiff alleges his condition was caused by defendant's negligence in his decompression after the dive of 15 January 1994, and other acts of negligence.

Wisner worked for defendant as a diver from November 1992 until January 1994. In the course of this employment, defendant assigned Wisner to numerous jobs, of which ten percent (10%) required the plaintiff to work off fixed platforms and the remaining ninety percent (90%) required him to work from vessels. Wisner worked on approximately fourteen (14) different vessels owned by twelve (12) different companies. These facts were uncontested by the parties before the trial court, and the record on appeal supports these assignments.

STANDARD OF REVIEW

Appellate courts must review summary judgments *de novo. Waller v. American Seafoods Co.*, 97-0302 (La.App. 4 Cir. 10/1/97); 700 So.2d 1306, 1307. A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact, and that the mover is entitled to judgment as a matter of law. La.C.C.P. art. 966 B. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more essential elements of the adverse party's claim. La.C.C.P. art. 966 C(2).

The question of seaman status is a mixed issue of law and fact. *Harbor Tug and Barge Co. v. Papai*, ___ U.S. ___, 117 S.Ct. 1535, 1540, 137 L.Ed.2d 800 (1997). Interpretation of statutory terms is a question of law. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314 (1995). If reasonable minds applying the proper legal standard could differ, the employee's status as a seaman should be left with the jury. However, "summary judgment or directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356, 111 S.Ct. 807, 818, 112 L.Ed.2d 866 (1991).

ASSIGNMENT OF ERROR: The trial court erred in determining that plaintiff was not a seaman under the Jones Act because he did not serve a fleet of vessels under common ownership or control.

The Jones Act and the Longshore and Harbor Workers' Compensation Act provide two mutually exclusive remedies for maritime workers. *Papai, supra* at 1539. The Jones Act provides an action for damages for any "seaman" who suffers injury in the course of his employment but does not define the term, "seaman". 46 U.S.C. sec. 688(a). The LHWCA excludes from its coverage "a master or member of a crew of any vessel." 33 U.S.C. sec. 902(3)(G). In determining whether plaintiff is a seaman under the Jones Act, the court must construe that term as limited by the LHWCA. *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1070 (5th Cir. 1986).

Extensive jurisprudence assists us to determine whether a maritime worker enjoys seaman status under the Jones Act and is excluded from coverage by the LHWCA as a member of a crew of a vessel. Specifically, the United States Supreme Court has exhaustively addressed the appropriate standard by which to judge seaman status in this decade.

Essentially, the Court explained that two requirements control a maritime worker's eligibility for seaman status. The basic rule governing who is a seaman remains rooted in the federal Fifth Circuit's opinion in *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959). First, the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. This element is broadly applied and is not disputed in this

matter. Second, the maritime worker must have a "connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Chandris, supra* at 2190. "In deciding whether there is an identifiable group of vessels of relevance for a Jones Act seaman status determination, the question is whether the vessels are subject to **common ownership or control**." *Papai, supra* at 1541.

Plaintiff argues for application of jurisprudence granting divers, employed by one company to perform maritime tasks, and other similarly-situated maritime workers seaman status, even though the employee did not enjoy a permanent assignment to or have a substantial connection to a vessel or fleet of vessels under common ownership or control. Moreover, plaintiff argues that commercial divers are by the nature of their duties inherently entitled to status as seaman under the Jones Act. Basically, he argues that his job entitles him to seaman status regardless of connection to a vessel or fleet of vessels.

Connection to a Fleet of Vessels Subject to Common Ownership or Control

Wisner contends that *Papai* is not controlling, since his situation is distinguishable from Mr. Papai's employment arrangement. The Supreme Court specifically explained that "[a]n important part of the test for determining who is a seaman is whether the injured worker seeking coverage has a substantial connection to a vessel or a fleet of vessels, and the latter concept requires a requisite degree of common ownership or control." The

Court held that the only connection between the numerous vessels on which Papai served was the union hiring hall from which many employers hired various maritime workers for separate and distinct employments, and this connection did not constitute a fleet for purposes of seaman status. However, the Court explained that "[f]or the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." Furthermore, the Court stated, "[t]his is not a case where the employee was hired to perform seagoing work during the employment in question, however brief, and we need not consider here the consequences of such an employment." *Papai, supra* at 1540-43.

Wisner argues because he was hired to work only as a diver for PDNO on its various jobs, no reason exists for application of the rule of "a requisite degree of common ownership or control" of the vessels constituting a fleet. In *Papai*, the Court further explained the fleet concept and the relevant period of the maritime worker's employment. First, the Court held that if an employee alleges seaman status based on his connection to a fleet of vessels, he must prove that the vessels are subject to "the requisite degree of common ownership or control." Furthermore, the Court concluded that to distinguish between land-based and sea-based maritime workers, "the inquiry into the nature of the employee's duties for seaman-status purposes may concentrate on a narrower, not broader, period than the employee's entire course of employment with his current employer." *Papai, supra* at 1543.

However, Wisner's entire employment with PDNO is considered in determining whether he has a substantial connection to a vessel or fleet of vessels, under some degree of common ownership or control. The parties have not argued otherwise.

We are not persuaded that the rule requiring common ownership or control of the vessels constituting a fleet is not applicable to plaintiff's claim for seaman status, simply because plaintiff, a commercial diver, worked for one employer who assigned him to work from numerous vessels during the course of his employment.

Inherent Seaman Status of Commercial Divers

Plaintiff argues that prior jurisprudence carved out an exception to this general rule demanding common ownership or control of the fleet of vessels. He relies on several decisions, both state and federal, for this proposition, including: *Wallace v. Oceaneering Int'l.*, 727 F.2d 427 (5th Cir. 1984); *Hall v. Professional Divers of New Orleans*, 865 F.Supp. 363 (E.D.La. 1994); and *Lucas v. Tetra Technologies, Inc.*, 97-1195 (La.App. 4 Cir. 9/17/97); 700 So.2d 560.

In *Wallace, supra* the court recognized its numerous opinions requiring common ownership or control of the vessels constituting a fleet but held "that a commercial diver, who embodies the traditional and inevitably maritime task of navigation, has the legal protection of a seaman when a substantial part of his duties are performed on vessels." The court explained that "[i]t is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure **on the vessel** from which he makes the particular

dive on which he was injured, that makes Wallace a seaman." 727 F.2d at 436. However, a particular fact of *Wallace, supra* often omitted is that the plaintiff diver was permanently assigned to a particular vessel when the defendant hired him, but this vessel was not available when the job on which he was injured occurred. 727 F.2d at 430. Here, in contrast, Wisner was neither permanently assigned to a vessel nor was he even temporarily assigned to a vessel when injured. Wisner dove from a fixed platform.

In *Hall*, the federal district court followed the rule of *Wallace*. In *Lucas*, this court relied on *Hall* for its result. We believe, especially after the Supreme Court's recent decision in *Papai*, that the rule requiring common ownership or control for vessels to constitute a fleet requires a different result. Moreover, because the parties to this dispute are not quarreling about the relevant period of plaintiff's employment with defendant, we do not believe the cases upon which plaintiff relies for his argument are controlling.

PDNO employed Wisner for approximately two years before his injury in January 1994. He worked as a diver for the entire two years of his employment with defendant and dove from both vessels and fixed platforms. Wisner worked on fourteen different vessels owned by twelve different entities. He alleges that he has a substantial connection to a fleet of vessels. However, plaintiff fails to argue that the vessels constituting the fleet were subject to any common ownership or control. Guided by the rule announced in *Papai* that numerous vessels constitute a fleet only when these vessels are subject to some degree of common ownership or control, we agree with

the trial court's conclusion that plaintiff has not established sufficient connexity to a vessel or fleet of vessels.

CONCLUSION

Here plaintiff argues that he is a seaman either because he is connected to a fleet or because, as a diver, he is engaged in inherently maritime work and is thus a Jones Act seaman. Wisner did not offer any evidence that the fleet of vessels to which he claims a connection was subject to any degree of common ownership or control.

When Wisner was injured, he was in no sense "a master or member of a crew" of any vessel. Indeed, he was working from a non-vessel platform when injured. Plaintiff failed to prove any connection to any vessel or fleet of vessels under a degree of common ownership or control. Moreover, while diving may be inherently maritime, to be a seaman, a plaintiff must be doing the inherently maritime task on or from a vessel.

For the reasons given above, we affirm the trial court's summary judgment denying the plaintiff's claim for seaman status and dismissing his claims under the Jones Act.

AFFIRMED

RETURN REQUESTED
COURT OF APPEAL, FOURTH CIRCUIT
1515 POYDRAS STREET, SEVENTH FLOOR
NEW ORLEANS, LA 70112

CONRAD S. P. WILLIAMS, III
P.O. BOX 2017
HOUMA, LA 70361-2017

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans MAY 29 1998

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED DOUGLAS WISNER V. PROFESSIONAL DIVERS OF N.O.

No. 97-CA-2559

Very Truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

U.S. Const. art. 6

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

46 U.S.C. § 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant

employer resides or in which his principal office is located.

25TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-407 DIVISION "A"

DOUGLAS WISNER

VERSUS

PROFESSIONAL DIVERS OF NEW ORLEANS

FILED: JUN 11 1997 s/ Julie V. Cole
DEPUTY CLERK

MOTION FOR SUMMARY JUDGMENT ON SEAMAN STATUS

NOW INTO COURT, through undersigned counsel, comes defendant, Professional Divers of New Orleans, Inc., ("Professional Divers"), which respectfully moves this Honorable Court for summary judgment in its favor and against plaintiff, Douglas C. Wisner, on the grounds that there are no genuine issues of material fact as more fully set forth in the attached memorandum. As grounds and support of this motion, defendant respectfully submits that based on all pleadings filed, the exhibits, and attached affidavit of Larry Tomlinson (Professional Divers' President), there is no genuine issue of material fact to be decided and judgment should be entered as a matter of law. Furthermore, defendant, Professional Divers, respectfully asserts that should this Motion for Summary Judgment on Seaman Status be granted, all claims of the plaintiff should be dismissed, with prejudice.

WHEREFORE, mover prays for summary judgment herein its favor and against plaintiff, Douglas C. Wisner,

dismissing plaintiff's claims against this defendant, with prejudice and at plaintiff's cost.

And for all general and equitable relief.

Respectfully submitted,

BLUE WILLIAMS, L.L.P.

/s/ Richard S. Vale
RICHARD S. VALE (#12995)
3421 N. Causeway Blvd.,
Ninth Floor
Metairie, Louisiana 70002-3760
Telephone: (504) 831-4091
Attorney for Defendant
Professional Divers of
New Orleans

25TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-407 DIVISION "A"

DOUGLAS WISNER

VERSUS

PROFESSIONAL DIVERS OF NEW ORLEANS

FILED: JUN 11 1997 s/ Julie V. Cole
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON SEAMAN STATUS

MAY IT PLEASE THE COURT:

Douglas C. Wisner ("Wisner"), was employed at the time of his alleged injury by Professional Divers of New Orleans, Inc. ("Professional Divers"), mover, and was working aboard Exxon's fixed platform, WD-73, performing diving operations. This platform was located in the West Delta region at block 73-A. This is beyond the 3 mile boundary for the State of Louisiana. The diving operations were performed pursuant to a contract between Professional Divers and Dolphin Company who had previously contracted with Chevron U.S.A. to perform said work.

While working on this fixed platform, which was the only "vessel" from which Mr. Wisner performed work on this particular job, he and other divers, with assistance from the diving supervisor and the tenders, were performing deep water dives off of the lower level of the

platform. The work generally consisted of replacing anodes and other various repair and refurbishment work. On January 15, 1994, Mr. Wisner made one dive to a depth of 157 feet. The 175th dive table was used for his decompression and the decompression chamber following the dive.

On the following day, January 16, 1994, or approximately 24 hours later, Mr. Wisner began have dizzy spells and shortness of breath. The claimant was next put through a decompression test. After this test was completed, a decision was made to fly the claimant back to shore via helicopter which was accomplished on January 16, 1994. After being flown ashore, the claimant eventually sought treatment with the JoEllen Smith Medical Center and developed a rapid heart rhythm which required admission to the Intensive Care Unit. This condition developed on January 19, 1994, whereupon he was treated by a cardiologist, Dr. Kenneth Kerut, for an atrial flutter.

Subsequent to the accident, plaintiff filed suit against Professional Divers under the Jones Act and the General Maritime Law. Professional Divers seeks a judicial declaration that plaintiff is not entitled to assert a claim under the Jones Act. Plaintiff is ineligible for benefits under the Jones Act because, at the time of the accident, Wisner was not assigned to a vessel in navigation or an identifiable group of vessels under common ownership or control, did not perform duties that contributed to the function of a vessel and did not perform a substantial amount of work aboard a vessel or an identifiable group of vessels under common ownership or control.

ARGUMENT

The requirement for maritime workers who seek benefits under the Jones Act have been litigated frequently throughout the years. The original and oft cited test was enumerated in *Offshore Company v. Robison,* 266 Fd. 2d. 769 (1959). The *Robison* test to determine seaman status provided as follows:

> 1) If there is evidence that the injured worker was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and,
>
> 2) If the capacity in which he was employed or the duties which he performed contributed to the function of the vessel and the accomplishment of his mission, or to the operational welfare of the vessel in terms of its maintenance during movement.

After numerous conflicting decisions in the various circuit court's of appeal, the Supreme Court had a chance to clarify the Jones Act seaman status test in *McDermott International, Inc. v. Wilander,* 111 S.Ct. 807 (1991). Mr. Wilander was a paint foreman working for McDermott on oil platforms in the Persian Gulf. He was assigned to the M/V Gates Tide, a paint boat chartered to McDermott. He filed a Jones Act suit against McDermott and received a jury verdict holding that he was either permanently assigned to or performed a substantial part of his work on M/V Gates Tide and that his duties contributed to the function of the vessel or to the accomplishment of its mission. The Fifth Circuit affirmed.

The Supreme Court held that the person does not need to aid in the navigation of the vessel. Instead, the appropriate criteria is to look to the employees' connection to the vessel in navigation. It is not the employee's particular job that is determinative, but the employee's connection to a vessel. Thus, the employee's duty must contribute to the function of the vessel or to the accomplishment of its mission, not necessarily aid in navigation. The remainder of the *Robison* test remained intact after *Wilander.*

Recently, the Supreme Court again clarified the seaman status test in *Chandris, Inc. v. Latsis,* 115 S.Ct. 2172 (1975). Latsis was a superintendent engineer for Chandris which required him to take voyages on Chandris ships. He lost vision in one eye after a condition he developed while on one of the voyages went untreated by the ship's doctor. After recuperation, he sailed to Germany on another vessel and stayed with the ship while it was in dry dock for refurbishing. A jury returned a verdict for *Chandris* based solely on the *Latsis* seaman status. The court held that an employment related vessel in navigation which is necessary for seaman status comprised of two basic elements:

> (1) The workers' duties must contribute to the function of the vessel or to the accomplishment of its mission, and
>
> (2) The worker must have a connection to a vessel in navigation, or to an identifiable group of vessels that is substantial in both duration and nature.

The decision did not modify *Wilander's* earlier holding that the employee need not aid in the navigation of the vessel.

Vessels/Identifiable Group of Vessels

Plaintiff's claim for relief under the Jones Act should be dismissed for a variety of reasons, however, the strongest reason is simply that the plaintiff does not meet the second prong of the *Chandris/Wilander/Robison* tests requiring that the worker have a connection to a vessel in navigation or an identifiable group of vessels that is substantial in both its duration and nature. The Fifth Circuit succinctly defined an identifiable group of vessels/fleet as follows, "By fleet we mean an identifiable group of vessels acting together under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aborad [sic]. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew in transit to a maritime worker is totally obliterated." *Barrett v. Chevon* [sic], *U.S.A.*, 781 F.2d 1067 5th Cir. (1986).

The *Barrett* court cited, *Davis v. Hill Engineering, Inc.*, 549 F.2d. 314 5th Cir. (1983) for the proposition that, "a worker may qualify as a crew member is [sic] he does substantial work on the vessel even though his assignment to it is not "permanent". The court went further to say that in order to prove "substantial work" as an equivalent to permanent assignment, it must be shown that the claimant performed a significant part of his work aboard the vessel with at least some degree of regularity and

continuity which evidences a vessel relationship that is substantial in point and time and not merely spasmodic. This reflects more than a transitory connection with the vessel or a specific group of vessels. After examining the facts, the *Barrett* court found that during the year that Mr. Barrett had worked for his employer, 20% – 30% of his work was aboard vessels although during the 8 day period proceeding the injury he spent as much as 70% of his time aboard the vessels. There was also finding that while aboard the vessel, Barrett contributed to the function of the vessel. A majority of the court stated that unless there has been a recent change in job duties, the workers' annual work history proceeding the accident is to be viewed as a whole to determine whether or not he is a member of the crew or vessel and whether he performed a substantial portion of his work aboard a vessel or an identifiable fleet of vessels.

The *Barrett* decision established one exception to the requirement that there be some connection to a vessel either permanently or under the "substantial work" test by refusing to include in its definition, the status of a maritime worker who spends virtually all of his time performing traditional seaman's duties – work closely related to the *movement* of vessels – but does work on shorter voyages aboard a large number of vessels. See *Bertram v. International Mooring and Marine, Inc.*, 700 F.2d 240 5th Cir. (1983) n13. *Bertram* provides an example of the type of employee that would meet this exception. The plaintiff was an anchor handler whose job duties included securing anchors loosened by bad weather, relocating drilling rigs and letting the vessel for its mission. Bertram worked 95% of his time on vessels and

obviously assisted in the movement of the vessels due to the nature of his job as an anchor handler.

It is appropriate for the district court to grant summary judgment on the issue of seaman status when there is no factual dispute to be resolved as to whether the plaintiff is a seaman. *Barrett*, 781 Fd. 2d et [sic] 1004. As the court stated in *Thibidaux v. J. Ray McDermott and Co.*, 276 F. 2d. 42, 46 5th Cir. (1960), the *Robison* test has *not* "perforce make every case of [of seaman status] one a fact for jury decision."

In the case at bar, Wisner did not perform a substantial amount of his work aboard a vessel or an identifiable group of vessels, nor was he assigned more or less permanently to a vessel or identifiable group of vessels. In order to prove the "substantial work" equivalent to permanent assignment, "it must be shown that the claimant performed a significant part of his work aboard the vessel with a [sic] least some degree of regularity and continuity." *Barrett* 781 F. 2d. at 1073-1074. This is also supported by the Supreme Court's decision in *Chandris* requiring that the connection to a vessel in navigation or identifiable group of vessels in navigation be *substantial* in both *duration* and *nature*. See *Chandris v. Latsis*, supra.

Wisner worked periodically for Professional Divers for approximately 2 years prior to the accident. Available records indicate that Wisner worked approximately 48 days for Professional Divers. (See Professional Divers daily work and diving sheets, attached as exhibit "A".) These records indicate that Wisner worked approximately 10% of his time on a fixed platform, while spending approximately 90% of his time working off of vessels

during his employment with Professional Divers. However, he worked on approximately 14 different vessels owned by, at least 12 different companies (see exhibit "A"). Prior to this incident, he was working off of a fixed platform in the federal waters off the coast of Louisiana. As such, Wisner's connection to the vessels were never more than transitory. Wisner was never permanently assigned to any of the vessels aboard which he worked, as it was not the custom or practice of Professional Divers to assign crew members permanently to a vessel. (See affidavit of Larry Tomlinson, attached hereto as exhibit "B")

Significantly, the vessels aboard which Wisner worked did not constitute a fleet because they were not under common ownership or control as required by *Barrett*. As stated above, the plaintiff worked on approximately 14 different vessels owned by, at least 12 different companies. The Fifth Circuit in *Barrett* rejected the notion that a fleet of vessels means any group of vessels an employee happens to work aboard. As was stated above, unless fleet is given this restricted meaning, the Fifth Circuit explained, "the fundamental distinction between members of a crew and transitory maritime workers' such as longshoreman is totally obliterated." *Barrett*, 781 F.2d. at 1074.

Finally, the plaintiff worked as a commercial diver on each of these jobs as is clearly evidenced by the testimony of the plaintiff in his deposition (See attached deposition transcript of plaintiff attached as exhibit "C") and the affidavit of Larry Tomlinson. (See exhibit "B".) In performing this line of work, the claimant, at no time, assisted in the movement of the vessels as is required

under the lone *Barrett* exception. Therefore, the claimant fails to meet the second prong of the *Chandris* test as he was neither permanently assigned to a vessel or identifiable grope [sic] of vessels, never performed work that was substantial in both duration and nature on any vessel or group of vessels under common ownership or control. Finally, the claimant does not meet the lone *Barrett* exception as the claimant did not, unlike the anchor handler in the *Bertram* cases cited supra, contribute to the movement of these vessels at any time.

A line of recent Fifth Circuit cases displays the vitality of *Barrett's* common ownership or control requirement which was adopted under *Chandris*. In *Ashley v. Epic Divers, Inc.*, 818 F.Supp. 172 (E.D.La 1991), the plaintiff performed 5 diving jobs while employed by Epic Divers from August 16, 1990 until his injury on November 20, 1990. None of these diving jobs were directly related to the movement of the vessel. In working as a diver, he performed no maintenance or navigational functions of the vessel but, instead, checked and replaced anodes on offshore pipelines. He also set risers and boat bumpers on offshore platforms. He was injured while attempting to place a cover over an open grate beneath the water line of a Navy ship. The court held that none of these activities were related to the *movement* of the vessel. Although the work was traditionally maritime activity subjecting Mr. Ashley to the perils of the sea, and the activity may have aided in the mission or task of the vessel, it is in no way related to the *movement* of the vessel. As such, he failed to meet the narrow exception carved by the *Barrett* court in order to avoid having to meet the fleet or group of vessels requirement stated in *Robison, Wilander, Chandris,* and

Barrett. The court stated that, "The issue in this case is whether Ashley performed a substantial part of his work on a fleet of vessels." The court noted that, "Ashley must show that he was not merely a transitory maritime worker." In determining that Ashley was not a seaman, the Court stated,

> "Ashley, who worked on short voyages aboard a number of unrelated vessels, was a transitory worker. Epic is an independent contractor that sends its divers to customers requesting diving services. Epic, which did not own or charter the vessels on which Ashley worked, randomly assigned Ashley to various customers . . . all five jobs were for a definite time and never lasted longer than 4 days. Because Ashley fails to meet the attachment to a vessel or a fleet requirement, we affirm the District Court's summary judgment."

The present case involves virtually indistinguishable facts from *Ashley*. Wisner worked on short voyages on board a number of unrelated vessels owned by unrelated companies. Also, Professional Divers did not own or charter the vessels on which Wisner worked. In fact, Professional Divers did not own or charter any vessels during the time that Mr. Wisner was employed by Professional. (See exhibit "B") Finally, Wisner, like *Ashley*, was not permanently assigned to any of the vessels aboard which he worked. (See exhibit "B".)

In *Masterson v. Epic Divers, Inc.*, 804 F. Supp. 869 (E.D. La. 1992), the plaintiff was assigned as a diver to a pipeline removal project. Plaintiff worked for 6 days diving from a self propelled barge in Buras Bay, and next worked for 3 months as a diver for 4 separate barges in

Timblier Bay. During that time, he was called away from Timblier Bay to perform diving services at Avondale Shipyard wherein he dove from small boats and from land based ladders. He later worked on 4 different barges in Timblier Bay, all owned by different owners.

The court reviewed the *Barrett* analysis as outlined above and specifically noted the exception contained in footnote 13 of the *Barrett* decision. After examining the context of his entire employment to see whether the claimant performed a substantial amount aboard a fleet of vessels and contributed to the movement of those vessels, the court granted defendant's motion for summary judgment on seaman status issue. The panel went further then the *Ashley* decision. It held that the exception located in *Barrett* was not valid and that the Fifth Circuit has never removed from the seaman status test the requirement that an injured worker show attachment to a vessel or identifiable group of vessels.

As such, Louisiana state and federal courts, as well as, the Supreme Court has not relaxed the connection to the vessel or identifiable group of vessels as part of the seaman status test. There has been only one exception enumerated in the *Barrett* case and this simply is not applicable in this matter as the plaintiff at no time contributed to the movement of the vessels as per his own deposition testimony. (See exhibit "C") In fact, in performing this type of commercial diving work, the plaintiff was more akin to a passenger on these vessels rather than a crew member.

CONCLUSION

In the present case, Wisner was randomly assigned to vessels and platform jobs, and he was never permanently assigned to any vessel or job location during the 3 years of employment with Professional Divers. Although Wisner spent a considerable amount of time working off shore, he worked for approximately 12 different companies aboard approximately 14 different vessels. These vessels, owned by different companies, should not be considered a "fleet or group" under common ownership or control. Accordingly, Wisner does not merit seaman status because his services were those of a "transitory worker".

Considering the foregoing, defendant, Professional Divers, respectfully asserts that plaintiff should be barred from maintaining a claim under the Jones Act. Therefore, Professional Divers respectfully requests that its Motion for Summary Judgment be granted and that plaintiff's claims under the Jones Act be dismissed, with prejudice, with plaintiffs to bear all costs.

Respectfully submitted,

BLUE WILLIAMS, L.L.P.

/s/ Richard S. Vale
RICHARD S. VALE (#12995)
3421 N. Causeway Blvd.,
Ninth Floor
Metairie, Louisiana 70002-3760
Telephone: (504) 831-4091
Attorney for Defendant
Professional Divers of
New Orleans

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on counsel for all parties by placing same in the U.S. Mail, postage prepaid and properly addressed on May 29, 1997.

/s/ Richard S. Vale
Richard S. Vale

EXHIBIT B

25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NO. 38-407 DIVISION "A"

DOUGLAS WISNER
VERSUS
PROFESSIONAL DIVERS OF NEW ORLEANS

FILED:_____

_____
DEPUTY CLERK

AFFIDAVIT

State of Louisiana

Parish of Jefferson

BEFORE ME, the undersigned authority, personally came and appeared;

LARRY TOMLINSON,

who, after by me, first duly sworn, did depose and say:

1. He is a person of the full age of majority and a resident of the State of Louisiana,

2. He has been and remains the owner and President of Professional Divers of New Orleans, Inc. since 1984;

3. He has personal knowledge of the facts stated herein;

4. Douglas Chester Wisner was employed by Professional Divers of New Orleans, Inc. at various times between November of 1992 and January of 1994 as a commercial diver;

5. During the period between 1992 and January 14, 1994, Douglas Chester Wisner performed commercial diving work for Professional Divers of New Orleans, Inc. for the various companies and aboard the various vessels outlined in the work/diving records attached;

6. That Professional Divers of New Orleans, Inc. did not own or operate any of the vessels aboard which Douglas Chester Wisner worked during his employment with Professional Divers of New Orleans, Inc.;

7. That at no time during his employment with Professional Divers of New Orleans was Douglas Chester Wisner permanently assigned to a vessel or an identifiable group of vessels, and Douglas Chester Wisner was never permanently assigned or attached to any vessel on which he worked while during the employ of Professional Divers of New Orleans, Inc.; and

8. That as the owner and President of Professional Divers of New Orleans, Inc., he does hereby certify that the attached records are a complete copy of all work/dive records or a complete in the possession of Professional Divers of New Orleans, Inc. which indicate any and all jobs on which Douglas Chester Wisner performed work for Professional Divers of New Orleans, Inc. between 1992 and January 14, 1994.

/s/ Larry Tomlinson
Larry Tomlinson

Sworn to and subscribed,

BEFORE ME, Notary,

this 30th day of May, 1997.

NOTARY PUBLIC

/s/ _____

EXHIBIT C

[p. 1] 25TH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

DOUGLAS WISNER

VERSUS NO. 38-407
DIVISION "A"

PROFESSIONAL DIVERS OF NEW ORLEANS

DEPOSITION OF DOUGLAS CHESTER WISNER taken before Huey L. Bang, Certified Court Reporter in and for the State of Louisiana at 3421 North Causeway Boulevard, Ninth Floor, Metairie, Louisiana taken on the 29th day of April, 1996.

APPEARANCES:

Representing the Plaintiff:
CONRAD S. P. WILLIAMS, III, ESQUIRE
St. Martin & Lirette (PLC)
3373 Little Bayou Black Road
Houma, Louisiana 70361

JOSEPH W. WALKER, ESQUIRE
Franklin, Mosele & Walker, P.C.
4200 Westheimer
Suite 130
Houston, Texas 77027

Representing the Defendant:
RICHARD S. VALE, ESQUIRE
Blue Williams, L.L.P.
3421 North Causeway Boulevard
Ninth Floor
Metairie, Louisiana 70002

Reported By:
Huey L. Bang, CCR, RPR

CORRECTION SHEET

PAGE	LINE	SHOULD READ
21	2	You had to prove a medical checkup
32	19	of it with me. He would send
34	25	of New York, Regents College, it's an
36	2	suit would be bringing to the job sites,
42	2	locating missing heirs and after discovered
53	24	working off a Bisso Marine Derrick Barge
57	13	No, only a controlled ascent.
89	12-23	* _____
119	8	Diving umbilical from between the two vessels, but
31	3	did say there was a test he would talk to
35	17	I was a tender and diver.
49	6	Work. It was a work platform.
78	6	At a nautical chart to know that
124	9	Dr. Paul Staub
127	21	think I meet most of the people there and I had

[p. 2] EXAMINATION INDEX

DOUGLAS CHESTER WISNER	PAGE
EXAMINATION BY MR. VALE:	4
EXAMINATION BY MR. WALKER:	128

EXHIBIT INDEX

WISNER 1	71
WISNER 2	81
WISNER 3	82
WISNER 4	84
WISNER 5	84
WISNER 6	97

[p. 3] STIPULATION

It is stipulated and agreed by and among Counsel for the various parties hereto that the deposition of DOUGLAS CHESTER WISNER may be taken for discovery and all other purposes, in accordance with the provisions of the Louisiana Code of Civil Procedure, at the time and place hereinabove recited;

That all formalities are hereby specifically waived except that of reading and signing;

That all objections, save objections as to the form of the questions and the responsiveness of the answers, are reserved until such time as this deposition, or any part hereof, is used or sought to be used in evidence at the time of the trial of this matter.

* * * * * * * * * * * * * *

HUEY L. BANG, Certified Court Reporter in and for the State of Louisiana and for the State of Mississippi, officiated in administering the oath to the abovenamed witness.

[p. 4] DOUGLAS CHESTER WISNER

180-I Elm Street, Pittsfield, Massachusetts, 01201 after being duly sworn by the Reporter testified as follows:

EXAMINATION BY MR. VALE:

Q. Good morning, Mr. Wisner. My name is Rick Vale and I represent New Orleans Professional Divers in this claim that you've brought. And I'm here today to obtain your deposition to learn more about you, the facts surrounding the incident, your medical status, and other things that may be deemed relevant in this case.

If at any time you don't understand my question, please stop me, tell me you don't understand my question, and I will try and rephrase it. Otherwise, if I ask a question and I get a response from you, I will assume that you understood it well enough to give me a response. Also, please let me finish asking my question before you, in turn, begin your answer, and I will try not to interrupt you while you are talking, that way only one of us is talking at a time, that way the court reporter can take it down. Also, it's typical [p. 5] in conversation to say uh-huh and uh-uh and nod the head yes or no, but the court reporter can't take that down. So from time to time when you do say uh-huh or uh-uh I will ask you to say was that a yes or no for clarification on the record. And I will also ask you at the end of the deposition to confer with your

counsel to see if you want to read and sign the deposition, but don't worry about that right now, we will do that at the end.

Could you state your full name?

A. Douglas Chester Wisner.

Q. Where do you live at the present time?

A. Pittsfield, Massachusetts.

Q. And what's the address?

A. My residential address is 153 South Street, my mailing address is 180-I Elm Street.

Q. How long have you lived there?

A. Approximately, let's see, approximately, eight years.

Q. And who lives with you at that address?

A. Just myself.

[p. 6] Q. Are you married?

A. No.

Q. Have you been married?

A. Yes.

Q. How many times have you been married?

A. Once.

Q. And to whom were you married?

A. To Mary Ann Sicotte.

Q. And where does she live at the present time?

A. Somewhere in Massachusetts.

Q. Any children?

A. No.

Q. And how long were you married to her?

A. Three years.

Q. And what kind of employment are you engaged in at the present time, if any?

A. I am an ROV pilot/technician. I work for ROV Technologies.

Q. And what do you do for ROV?

A. Operate, provide field service or field support for their remotely operated vehicles.

Q. What kind of vehicles have they got?

A. They build crawlers and subs for use [p. 7] in the nuclear power industry.

Q. Tell me kind of what you do on a daily basis, basically?

A. In the field we provide, let's see, – we maintain and operate remotely operated vehicles under the direction of the engineering departments of various nuclear power plants.

Q. Is any of your stuff secret or confidential?

A. No, it's commercial power plants.

Q. Who is your supervisor?

A. Jack Judge.

Q. And how long has he been your supervisor?

A. Approximately, one year. I started working for them in January of 1995.

Q. And how much are you getting paid at the present time, what's your salary, annual, weekly, monthly, whatever is easiest for you?

A. The shop rate is 13 dollars an hour. Field rate is 20 dollars an hour.

Q. And the equipment that ROV typically uses is remote –

A. Remotely operated vehicles. ROV is a [p. 8] generic term for remotely operated vehicles.

Q. So this is the equipment that will go down to the bottom, which is controlled from a ship on the surface?

A. Yes. In our case, we're in a smaller environment than that, but from the surface it's controlled remotely.

Q. And what kind of work are these ROVs doing when they get to the bottom?

A. Our particular vehicles provide in-vessel visual inspection for the vessels of nuclear power plants. Provides surveillance on fuel handling and fuel movements.

Q. So if RED OCTOBER shows up and needs a check, you would send one of your ROVs down to look the craft over and make sure that –

A. I think you are misunderstanding. The interior vessel, the nuclear power plant, you get strictly commercial operations, not a government –

Q. I thought you said submarines?

A. We build a sub that's used in the interior of a nuclear power plant.

Q. So this is inside a nuclear power plant?

[p. 9] A. Yes.

Q. And you are sending these ROVs into what area of a nuclear plant?

A. Into the spent fuel pools, the fuel transfer canals, and the vessel.

Q. To check for leaks?

A. Depends on what the engineering department is looking for. Typically, provide visual inspection on welds and supervise clearances to see that adequate clearance exists for movements of fuel.

Q. Is this an operating power plant or new construction?

A. Plants that are in operation, but the work is done during their refueling outages.

Q. So you would do this not at any one particular power plant, but during a turnaround, shutdowns, and that sort of thing?

A. Yes.

Q. How did you learn how to do this?

A. From experiences working with remotely operated vehicles in the offshore oil industry. There's some cross-transfer technology.

Q. And are you primarily used to operate [p. 10] the ROV unit, or are you more or less utilized to view the welds and that sort of thing?

A. Operating the vehicles and the equipment, and maintaining the equipment.

Q. So that's why you're an ROV pilot?

A. Yes.

Q. How much were you making when you worked at New Orleans Professional Divers, do you remember?

A. As I recall, about 13 dollars an hour, I think it was.

Q. So are you making at least the same now as you were for New Orleans Professional Divers, if not more?

A. I would say it would be about equal. Diving compensation also depends on depth pay, so that can be a variable that's difficult to figure.

Q. But you didn't get that all the time; is that correct, it was only on certain type jobs that you would get that?

A. True.

Q. At the time of your accident, you were still actively diving, you were not a non-diving supervisor; is that correct?

[p. 11] A. I was a diver.

Q. Had you worked as a non-diving supervisor at any time for New Orleans Professional Divers?

A. No.

Q. What other work, if any, have you done after leaving New Orleans Professional Divers?

A. I worked very briefly for my brother, who is a painting contractor, and I did a 90 day tour with Son Sub, Incorporated, which is also an ROV operator. Their primary business focus is the offshore oil industry.

Q. Where did you work for them?

A. Out of their Houston office on assignments in the Gulf of Mexico.

Q. And when did you work for them?

A. From July of '94 to, let's see, July, August, September, to October, it was 90 days from July, sometime just after the 4th of July of '94.

Q. And you would go out in the Gulf and operate these remote vehicles there?

A. Yes.

Q. And check for structural integrity of [p. 12] rigs, et cetera?

A. Yes.

Q. And how much were you paid for Son's Sub?

A. Let's see, that's Son Sub, as I recall, I was supposed to be paid 12 dollars an hour, but it turned out I was paid nine dollars an hour during an initial 90 day hiring period.

Q. Which is about the whole time you were there?

A. Yes. Yeah, I believe that's the best that I recall at this time.

Q. Why did you leave Son Sub?

A. Because I had spoken to ROV Technologies at various times, and they were going to be paying me more money, basically.

Q. And so then you went up, back to New England and started working for your brother for a period of time?

A. No that was prior to working for Son Sub.

Q. What kind of work were you doing for him?

A. Painting and wallpapering, interior [p. 13] painting.

Q. Interior, okay. And when did you work for him?

A. Let's see, that would have been, approximately, May of 1994, May or June, I'm not sure of the dates right now.

Q. So is it fair to say that for a couple of months before you went to work for Son Sub in Houston, you worked for your brother as an interior painter and wallpaper hanger?

A. Yes.

Q. How much did you make with him?

A. As I recall, I think it was seven dollars an hour.

Q. And where is he located?

A. He lives in Hinsdale, Massachusetts.

Q. Anywhere else that you worked following your work at New Orleans Professional Divers, other than these three places you told me about so far?

A. That's it.

Q. Have you had any pay raises since working for ROV?

A. No.

[p. 14] Q. Are you in line for one soon?

A. No.

Q. How do they work pay increases, if you know?

A. Just based on reviews.

Q. I mean, is there an automatic one year review and usual pay increase of something?

A. No.

Q. Is this union?

A. No.

Q. Do you have to be certified in any way to do this work?

A. Could you explain, what do you mean by certification?

Q. Do you have to go to school and get any kind of certification or license or anything like that to do this kind of work?

A. Not a license. You do have to show competency.

Q. But it isn't like you have a special little card saying you are an ROV pilot?

A. Right.

Q. Can you give me your educational background?

[p. 15] A. I, let's see, attended – well, from what point?

Q. I would assume high school?

A. Graduating from high school?

Q. Yes.

A. I had a short program with Alarm Device Manufacturing Corporation and Alarm Training as an alarm technician, burglar, security alarm. Attended and graduated from the College of Oceaneering in Wilmington, California.

Q. What was that all about?

A. Mix gas and air diving training, underwater photography and video.

Q. How long was that course?

A. 90 day course.

Q. Where was this, again?

A. At the College of Oceaneering.

Q. Where?

A. In Wilmington, California.

Q. Is that near San Diego?

A. It's in Los Angeles, part of the harbor, in the Harbor District of Los Angeles.

Q. I would assume that upon graduation you received a certificate from this school?

[p. 16] A. Yes.

Q. And what was the certificate in?

A. Air mix gas diving and underwater photography and television.

Q. Now, would that certification allow you to buy air and go diving wherever you wanted in the United States, or did you still have to then go get a state certification from wherever you went to do that kind of work, if you know?

A. Prior to that, I had a sport diving certification which would allow me to buy air at any scuba shop.

Q. When did you get your sport diving certificate?

A. In 1969.

Q. And when did you graduate from the College of Oceaneering?

A. In May of 1975. It may have been June of 1975.

Q. What kind of diving had you done before you went to the College of Oceaneering?

A. Primarily recreational diving, in the rivers, quarries, lakes, and coastal New England. And I had a brief – a couple of [p. 17] commercial diving projects with Marine Contracting International of Southport, Connecticut.

Q. Where was that again, the commercial diving?

A. Marine Contracting International of Southport, Connecticut.

Q. And how many commercial dives did you make for them, if you know, approximately?

A. Gee, probably about a half dozen.

Q. Over what period of time?

A. Over a week.

Q. Just one week?

A. Yes. And that wetted my appetite to pursue diving as a career.

Q. When was this you did the commercial diving with Marine Contracting?

A. That would have been 1974.

Q. Now, up in Connecticut, do you dive all year round or do you usually limit it to the warmer months?

A. Referring to recreational diving or commercial?

Q. Commercial.

A. They have the capabilities to dive [p. 18] year round, it's just that typically there's not much work done in the wintertime.

Q. And was all your recreational diving up in New England, too, or did you –

A. At that point in time, yes.

Q. Had you ever sustained a hit or gotten sick in any way while diving either recreationally or commercially prior to going to the College of Oceaneering?

A. No.

Q. No hits, no problems whatsoever?

A. No problems at all.

Q. What was your health status as of May of 1975, May or June of '75 when you left the College of Oceaneering?

A. I had a clean bill of health.

Q. No heart problems?

A. No. I had had an atrial septic defect repaired in 1969. Prior to attending College of Oceaneering I had a consultation with my doctors, and they did not see a problem with my career goal.

Q. What other problems had you had in the past, if any, leading up to your graduation at the College of Oceaneering?

[p. 19] A. None.

Q. Who initially diagnosed your atrial septic defect?

A. I think my pediatrician. I do not know.

Q. Up in Connecticut?

A. In Massachusetts.

Q. And what, essentially, did the doctors explain to you before your operation as to what your problem was?

A. That I had a heart murmur due to an atrial septic defect.

Q. Did they explain to you what that was?

A. Yes.

Q. And what did they tell you?

A. That it was an opening in the septum that they would close.

Q. Where did you have the surgery?

A. At St. Elizabeth's Hospital in Brighton, Massachusetts.

Q. And the surgery was a success?

A. Yes, it was.

Q. How long did you stay in the hospital, approximately?

[p. 20] A. Approximately, two weeks.

Q. And how did they perform the surgery, did they open your chest up or do they do it with –

A. Yes, they did open my chest.

Q. They didn't do it with an ROV kind of situation?

A. No, I don't think they had that technology then.

Q. What limitations, if any, did the doctors place on you following that surgery regarding any activities?

A. The following year just moderate physical activity, and until a subsequent physical, and afterwards I had unrestricted activity.

Q. Was that in 1970 that you got the unrestricted physical activity?

A. I would think so, yes.

Q. And how did they determine that the surgery was a success, did they do an echocardiogram on you or EKG?

A. I don't remember at this time.

Q. And when you went to the College of oceaneering, did they give you a medical [p. 21] checkup there?

A. They had to provide a medical checkup as an entrance requirement.

Q. And do you recall who you went to to get that checkup in California, if it was in California?

A. Again, this was a family doctor in Massachusetts.

Q. Do you remember who that was?

A. It was a Dr. Budnitz, B-U-D-N-I-T-Z, I think it is.

Q. What kind of doctor was he, if you recall?

A. A cardiologist.

Q. Was he involved with the surgery itself?

A. No.

Q. But he was the one that gave you the medical clearance to begin your course of study at the College of Oceaneering?

A. Yes, and provided a letter.

Q. Do you have a copy of that somewhere?

A. At this point I don't know where it has gone. He was involved in the diagnosis of this and in referring me

to the other doctors [p. 22] involved that did the surgery. So he was aware of my case prior and after.

Q. And were you required to take any medications following your clearance in 1970?

A. No.

Q. Are you on any medication at the present time?

A. Digoxin.

Q. Who prescribed that?

A. A Dr. Hays.

Q. Where is he?

A. In Kankakee, Illinois.

Q. What is that for?

A. To regulate heartbeat.

Q. Why are you seeing a doctor in Illinois?

A. I had an incident in October where I had a tachycardia.

Q. October of '95?

A. Let's see, this is '96 now, yes, October of '95.

Q. Where did you have this episode of tachycardia?

A. In Illinois.

Q. What were you doing in Illinois?

[p. 23] A. I was on assignment, work assignment there.

Q. So even though most of your work is up in New England with ROV, they will even send you to nuclear plants wherever?

A. Throughout the US, yes.

Q. Have you done the Taft Nuclear Plant here in Louisiana?

A. No, we haven't been there, yet.

Q. So your work really takes you across the country?

A. Yes.

Q. So what happened in October of '95?

A. I had a rapid heartbeat, so I had to see a physician because I needed to get some treatment for it.

Q. Where were you when this happened, at work?

A. Yes.

Q. And they took you by ambulance somewhere?

A. Yes.

Q. Where, what is the name of the hospital?

A. Riverside Medical Center, I believe [p. 24] is the name, Kankakee, Illinois.

Q. And how long did you stay in there?

A. Three days, I think it was.

Q. And what did the doctors tell you following your discharge from that hospital?

A. To keep taking medication.

Q. Had you been on the medication before that?

A. No.

Q. Had you been on any heart medication of any kind since 1970, which was, approximately, when you got your unrestricted release following your ASD surgery?

A. I had had Digoxin prior to that due to a tachycardia incident prior to, I think it was in 1988.

Q. Who initially prescribed the medication?

A. Dr. Thomas Egan.

Q. Where is he?

A. In Pittsfield, Massachusetts.

Q. So the first time you recall experiencing tachycardia was in 1988?

A. Yes.

Q. And were you taken to a hospital on [p. 25] that occasion?

A. I went to a hospital and was examined by Dr. Egan and given treatment.

Q. And what hospital was that?

A. Berkshire Medical Center.

Q. Is that B-E-R-K-S-H-I-R-E?

A. Yes.

Q. And that's when you started on the the –

A. Digoxin.

Q. And were you advised by Dr. Egan at that time that you were going to have to stay on that medication for the rest of your life?

A. No, pending a followup exam.

Q. When was the followup?

A. I would estimate, approximately, six months afterwards, six months to a year. I'm not clear on the date.

Q. 1988, '89 period?

A. Yes.

Q. Who performed the followup?

A. Dr. Egan.

Q. Did he keep you on the Digoxin at that time?

A. No, because I had not been taking it [p. 26] from then until this past October.

Q. So you had been off that medication from '88, '89, to October of '95?

A. Yes.

Q. Had you been on any other medication during that period of time?

A. No.

Q. Were you on any prescribed medication at all while you were working for New Orleans Professional Divers?

A. No.

Q. Do you have any other health problems at the present time, diabetes, whatever?

A. None that are – well, outside of what we're alleging in that suit.

Q. Well, what other health problems do you have at the present time?

A. Well, as detailed, short-term memory loss, impaired sexual function, difficulty handling stress, problems with numeracy skills.

MR. WILLIAMS: Numeracy?

THE WITNESS: I believe that's the term.

[p. 27] Mathematics. I don't do well with mathematics.

EXAMINATION BY MR. VALE:

Q. Is someone currently treating you for these problems in Massachusetts, Connecticut?

A. I'm still under Dr. Harsch's care.

Q. When was the last time you saw Dr. Harsch?

A. I think that would have been in March of '94, and then I saw his associate, Dr. Vanmeter, approximately, three weeks ago, and I have consulted with him on the telephone.

Q. Right now Dr. Hays is your cardiologist?

A. Well, he's the last doctor that I've seen other than Keith Vanmeter.

Q. Is there anyone in your area that you would be considering your treating physician at this period of time or monitoring your condition or whatever?

A. No.

Q. So your cardiologist is in Illinois, and the other doctors that you're seeing at the present time are here in the New Orleans area?

[p. 28] A. Yes.

Q. You have no treating physician or primary treating physician or family physician that monitors you, checks you, followups on you for heart problems or these other problems that you just advised me about in your area?

A. Well, the cardiologist, I would still see Dr. Egan if I felt that I needed to.

Q. When was the last time you saw Dr. Egan?

A. That would have been in, I think, 1989, I think is the checkup.

Q. But you haven't followed up with any cardiologists in your area following the episode in Illinois?

A. No.

Q. And you were here in New Orleans a couple weeks ago?

A. Yes.

Q. And what complaints did you give Dr. Vanmeter at that time, the same ones you just gave me?

A. Yes.

Q. Anything different?

A. I don't quite understand what you [p. 29] mean by different?

Q. You told him about the short-term memory, impaired sexual function, difficulty with stress, and problems with numbers?

A. Yes.

Q. Did you tell him anything else besides that?

A. I can't recall the exact details of our conversation, but things that would have been of a health concern I would have discussed with him.

Q. Did he prescribe any medication for you?

A. No.

Q. Did he give you any treatment?

A. He gave me an examination, and then prescribed some other tests to have done, but I don't know if that qualifies as treatment.

Q. What tests did he request, if you remember?

A. He wanted me to be examined, I can't recall the doctor's name now that I went to see on the Westbank. Also, a psychologist.

Q. Did you see this doctor?

A. Yes. It's in the record. I can't [p. 30] recall off the top of my head.

Q. You had seen this doctor before?

A. No.

Q. And what problems did you tell this doctor you had?

A. Let's see, he was a urologist, pertaining to the impaired sexual function.

Q. Let's talk about the psychologist first. What did you tell the psychologist?

A. Pertaining to the short-term memory loss, stress, some of the problems, cognitive function problems I have, and I was given some tests.

Q. What did the doctor say?

A. That she would refer the information to Dr. Vanmeter to be correlated. I wasn't really given any information.

Q. What about the urologist, what tests did you have done there? Did you stay overnight?

A. No, I was given a physical exam.

Q. Has he requested that you stay overnight for one of his nocturnal tumescent exams or any kind of other diagnostic measures?

[p. 31] A. Not to me. Although he did mention, I can't recall the name of the test, but he did say there was a test that I talked to Vanmeter about having done, which I can't recall what the name of it is.

Q. Did he say it had to be done overnight?

A. At this point, I don't know. I don't know what it involved.

Q. Do you remember who the urologist was?

A. No, I can't think of his name.

MR. WILLIAMS: I can give you the names of it. We haven't gotten any reports yet, but Dr. Jules Deutsch?

MR. VALE: Which one?

MR. WILLIAMS: Urologist. The clinical psychologist Doug referred to is Dr. Susan Andrews.

MR. VALE: She is on the Westbank?

THE WITNESS: [p. 32] She's here.

MR. WILLIAMS: I'm sorry, 3901 Houma Boulevard. And the last was a Dr. Kenneth Kerut, and he is in Marrero.

MR. VALE: What kind of doctor is he?

MR. WILLIAMS: He is a cardiologist.

EXAMINATION BY MR. VALE:

Q. Did you see Dr. Kerut recently, also?

A. Yes.

Q. And did he perform an exam on you?

A. Yes, he did.

Q. EKG?

A. Yes.

Q. What did he say, if anything?

A. Again, he didn't discuss the results of it with me, he just kind of returned everything to Dr. Vanmeter.

Q. And Dr. Susan Andrews didn't give you any results of your testing?

A. No.

Q. How long did you take tests with Dr. Andrews, one day, two days?

[p. 33] A. A full day.

Q. You did an MMPI?

A. Yes.

Q. Any other doctors you have seen recently at the request of Dr. Vanmeter?

A. Just those three.

Q. Have you been hospitalized for any reason since leaving New Orleans Professional Divers other than the episode that you told me about in Kankakee, Illinois?

A. No.

MR. WILLIAMS: I got lost there for a second. Did you see Dr. Vanmeter or just Dr. Harsch, or am I confused, three or four weeks ago?

THE WITNESS: That was Vanmeter. Dr. Harsch was not available.

MR. WILLIAMS: I'm sorry. Just wanted to make sure.

MR. VALE: That's all right.

EXAMINATION BY MR. VALE:

Q. After leaving College of Oceaneering, [p. 34] where did you go next?

A. Educationally?

Q. Yeah, let's stay with that for a second.

A. In 1986 I attended Berkshire Community College.

Q. And any particular course of study?

A. Business Administration.

Q. And did you obtain a degree from there?

A. I did not finish my degree.

Q. How far are you away from finishing the degree?

A. I don't recall, in terms of credits. I have, approximately, three or maybe four courses.

Q. And would that be a bachelor's degree or an associate's degree?

A. It would be an associate's.

Q. Are you going back to school?

A. I had been involved in the University of the State of New York's off-campus program.

Q. NYU?

A. No, it's the University of the State of New York, Regions College, and it's an [p. 35] off-campus program that I had taken some tests so that the three or four courses that I need to take, I can't recall the exact number

right now because it's been some time since I've looked at that material. That would be for a bachelor's degree.

Q. Are you in school right now?

A. No.

Q. Where did you go to work following your graduation from the College of Oceaneering?

A. I went to work for a company called Underwater Construction Corporation.

Q. Where are they located?

A. Essex, Connecticut.

Q. And what did you do for them?

A. It was a tender and a diver.

Q. What kind of work did you do up there?

A. Primarily diving work around electrical utilities, that is power generating plants, water intakes, repair of traveling screens, and some civil engineering projects.

Q. How would you get to these jobs, you go out on a boat or just off the damn?

[p. 36] A. Oh, it was primarily inland diving, so it would be driving to the drop sites, typically.

Q. And then what kind of work platform would you work off of, off the structure itself?

A. With them, they were primarily shore-based diving.

Q. How long did you work there?

A. From 1975 until, let's see, I think 1977, thereabouts.

Q. Why did you leave?

A. Because of the seasonal nature of the work, and I did some freelance diving for a company called EGA based in Richmond, Virginia. And then I went back to work for Underwater Construction Corporation in 1978. And then in 1978 I relocated to Morgan City, Louisiana and worked for Mar Tech International.

Q. How did you find Morgan City?

A. Just drove down Highway 90 and there it was.

Q. Were you looking for work in this area, or someone called you up and said come [p. 37] to the great city of Morgan City?

A. I like diving work, and I had to face the fact that diving in the northeast would be a seasonal job. And at that time with the oil, after the Arab oil embargo, there was just much more oil diving opportunities here than there.

Q. Who did you contact or who contacted you so that you got started down here?

A. I sent out resumes and talked to other people in the diving industry, and at the time the word was Mar Tech was the company to be with.

Q. Before going to work for Mar Tech, had you sustained any hits or any kind of illness whatsoever from diving?

A. No.

Q. And you understand what I mean when I say a hit?

A. Yes, the decompression sickness, yeah. I had no incidents.

Q. When did you start with Mar Tech?

A. I believe it would have been in the summer of 1978.

Q. Who was your supervisor there?

[p. 38] A. There were a couple. Primary person I reported to was Sam Hodge.

Q. What kind of work did you do for Mar Tech?

A. I started out as a tender, and became a diver tender.

Q. How long did you work just as a tender?

A. Approximately, a year.

Q. Why this year of working just as a tender if you had already had diving experience?

A. Because the different nature of the diving industry here, you are working in deeper water and more complex projects.

Q. So this was more or less to get your on-the-job training before you started diving yourself?

A. Yes.

Q. And how long did you work for Mar Tech, or when did you leave Mar Tech?

A. That would have been in the winter, around Christmas, 1979, 1 believe.

Q. So you only worked there a year, approximately?

[p. 39] A. Yes.

Q. Why did you leave them?

A. I was offered a job as a diver with Sea Dive, which later was bought by Sea Con Services.

Q. How long did you work for them?

A. Until 1981.

Q. And reason for leaving there?

A. I was fired.

Q. Why?

A. Primarily because I stuck up for a guy that I thought was getting shafted.

Q. It wasn't that you refused to do anything?

A. No.

Q. And this work was in the Gulf, too?

A. Yes, it was.

Q. Was the job with Mar Tech and the job with Sea Dive essentially the same as with New Orleans Professional Divers?

A. Yes.

Q. Who did you work for after Sea Dive?

A. After that, it was difficult to get employed in the diving industry, because there was starting to be a recession. So I worked [p. 40] for an alarm company in Houma.

Q. Okay.

A. And let's see, then at the time I was under intense financial pressure because I had invested in real estate and was having a difficult time because of keeping my property rented. So I left this area and went back to Massachusetts in 1983.

Q. With either Mar Tech or Sea Dive, did you sustain any hits or illnesses of any kind while diving?

A. No.

Q. And have you ever declared bankruptcy?

A. No.

Q. Did you weather this financial crisis?

A. I guess you would say so, yes.

Q. You kept all your properties and –

A. Oh, no, I had to – I've sold one and was not able to sell another one, I was foreclosed on.

Q. So you lost money in 1983, '84 time period?

A. Yes.

[p. 41] Q. And did you report that on your income tax returns as losses?

A. I don't recall.

Q. Did you normally file income tax returns while working?

A. Yes.

Q. Do you have copies of your tax returns for the past five or six years?

A. No, I don't.

Q. Do you have any tax returns?

A. Well, yeah. I don't know where exactly they are at the moment.

Q. Did you file your income tax return for 1995?

A. No.

Q. I assume you have an extension?

A. Yeah – well, I'm getting money back, so they probably don't care if I file it ever.

Q. Do you plan on filing one?

A. Yes.

Q. And so after returning to the New England area, what did you do next?

A. Let's see, I tried my hand at an asset recovery business, and went back to school in 1986.

[p. 42] Q. What's an asset recovery business?

A. Locating missing heirs and discovered assets and locating their owners.

Q. How did you do there?

A. You mean the mechanics of it?

Q. No, financially, I would assume you were on a commission basis?

A. Yes.

Q. And how did you do?

A. Let's see, I can't recall the exact numbers, but the first year, all I did was made a living at it.

Q. Why did you sort of get out of the dive business from '81 for the next couple of years?

A. Because I found it was difficult to get employed in the Gulf area, and working in shallow water inland diving didn't really appeal to me.

Q. Why not?

A. The nature of the work is different. When you are working offshore, you're working – to me it was a more satisfying environment than working in sewer outfalls.

Q. And after the asset recovery [p. 43] business, what did you do next?

A. Just held some odd jobs as I was going back to school, and in sometime around 1988, a friend of mine, who had been a former diver, and I did some contracting, diving contracting on a small scale in the Massachusetts area.

Q. And when did you return back to Louisiana?

A. In 19, what was that, '92, when Hurricane Andrew hit here.

Q. And who did you go to work for?

A. PDNO.

Q. Prior to going to work for New Orleans Professional Divers, or Professional Divers of New Orleans, had you sustained any hits or had any illnesses relating to diving?

A. No.

MR. VALE: Why don't we take a two minute break?

MR. WILLIAMS: Sure.

(SHORT BREAK)

EXAMINATION BY MR. VALE:

[p. 44] Q. Just before the break, Mr. Wisner, you indicated that you started with Professional Divers of New Orleans in 1992. In what job capacity did you initially start?

A. As a diver.

Q. As a diver?

A. Yes.

Q. And this was jobs in the Gulf of Mexico essentially?

A. Yes.

Q. What kind of work would you do when you worked for Professional Divers of New Orleans as a diver?

A. We worked on and installed anodes on platforms, repair pipelines.

Q. And did you have a supervisor with Professional Divers of New Orleans?

A. Let's see, field supervisory would change from job to job, but the person I reported to on a regular basis was Mike Wills.

Q. Did you ever work under Larry Tomlinson?

A. No, not in the field, no.

Q. Wills would be the one that would contact you and tell you whenever the next job [p. 45] was and that sort of thing?

A. Yes.

Q. And, of course, when you went out in the field you would have a different supervisor?

A. Yes, sir.

Q. Were you ever the supervisor in the field?

A. No.

Q. And have you had an opportunity to review your dive records with Professional Divers of New Orleans?

A. Not recently, no.

Q. Are you familiar with these kind of records from Professional Divers of New Orleans?

A. I haven't seen these since I've worked for them.

Q. I'm not asking you if you memorized anything.

A. No.

Q. Are you familiar with them?

A. Yes.

Q. Did you help fill them out from time to time?

[p. 46] A. Typically, for example, this would be signed by me. Very seldom did you fill out your own dive sheet. It would be unusual if you filled out your own dive sheet. Typically, you are looking at the sheet and signing it.

Q. But you are familiar enough with these that you've read them in the past and would sign off on them?

A. Yes.

Q. You say you went to work in 1992. What work did you do for Professional Divers in 1992, if you can recall, what jobs?

A. Pipeline repairs and anode placement.

Q. Where?

A. East Bay.

Q. Do you remember how long, roughly?

A. Approximately, two weeks, I think, or maybe longer. I can't recall the exact time.

Q. Do you remember who the supervisor was on that job?

A. I can't recall his name.

Q. Do you recall when that might have been that you did the job?

A. I think the job would have commenced [p. 47] around Halloween is when I got the call to go offshore.

Q. Did you have any incidents or hits or any kind of problems associated with that dive?

A. No.

Q. Do you remember the next one?

A. It was to determine the clearance on a pipeline subsequent to placing a jackup rig that involved hand jetting in the area of where the spud was going to be placed to see if there was a pipeline that would, you know, might interfere with the placement of the jackup rig.

Q. And how long were you out there on this?

A. It would have been about a week, maybe five days to a week.

Q. Do you remember when this was?

A. It would have been in November. I don't recall the exact dates.

MR. WILLIAMS: Do you want him to refer to the dive sheets?

MR. VALE: [p. 48] Does he have those?

MR. WILLIAMS: These.

MR. VALE: They start in May of '93, the ones that I have. Once we get to those we will get more detail.

EXAMINATION BY MR. VALE:

Q. Do you remember the next one after November?

A. Then the next was a project involving an inspection of a platform that involved water blasting growth down to the welds.

Q. And how long did that job last?

A. That would have been around five days. As I recall, that was relatively short.

Q. And when was this, if you recall?

A. That would have been, I think, December of '92.

Q. Where did you sleep and eat on this job?

A. That would have been on the vessels. In fact, all three of those jobs were vessels. We did our work off of boats.

Q. Even though this was a platform, you [p. 49] slept and ate on the vessel?

A. Yes.

Q. Other than sleeping and eating on the vessel, what else did you do on the vessel, if anything?

A. Work. There was a work platform.

Q. But the work you were doing, for instance, in December, was inspecting a platform and –

A. Yes.

Q. – that sort of thing. The one in November was with a jackup rig checking a clearance on a pipeline?

A. Yes.

Q. And what about the first one that you talked about, the pipeline repair and anode replacement, what were you working on essentially?

A. We were working from boats. Our equipment was set up –

Q. And this was just a pipeline?

A. Pipeline repairs, and we also replaced anodes.

Q. On the pipeline?

A. On some other platforms.

[p. 50] Q. The vessel that you worked on in October, do you remember the name of it?

A. No. It's in the records.

Q. Did you work on the same one in November as you had in October?

A. No, that was a different vessel.

Q. What about the one in December, was that the same one or a different one?

A. I will have to think for a second. I don't recall at this time.

Q. And were these jobs for different companies, the October, November, and December jobs?

A. I can't remember at this time.

Q. When you worked for Professional Divers of New Orleans, did you work for just one company who

had their own vessels, or did you work for different companies throughout your work for Professional Divers of New Orleans?

A. We did – PDNO did work for different companies.

Q. And, therefore, when you worked on vessels, you worked on different vessels?

A. Yes.

[p. 51] Q. And you also worked on platforms, slept and ate and worked from platforms?

A. Only on one occasion.

Q. Which one was that?

A. It's on this dive that I was hurt on.

Q. Other than the last time you worked for Professional Divers of New Orleans, which was a platform, all the other jobs you slept and ate on the vessel?

A. We slept and ate on vessels pretty much all the time, but the initial job that I worked on at East Bay, we slept and ate at the East Bay complex and performed work based on the vessels.

Q. When you say the East Bay complex, they had sleepers?

A. And it's a, I forget now what, it might have been Shell or Texaco, I can't recall, but they have a complex at East Bay where they support their field work. And I think that's subsequently been sold to another operator.

Q. When you worked from these vessels, did you ever do any work in regards to navigating the vessel from

point A to point B, [p. 52] or was your work primarily working with your equipment, that is your compressors and your gauges and your hoses and your other dive equipment, support the divers that were in the water doing whatever they were doing, or whatever you were doing?

A. We were involved in the diving aspects of it. We were not involved in navigating the vessel, or I was not involved in navigating the vessel, I should say.

Q. You were diving from the vessel or assisting other divers who were diving from the vessel?

A. Or assisting in diving operations, yes.

Q. But you were not involved in the navigation of the vessel itself?

A. No.

Q. And typically, these would be different vessels depending on what company you were working for?

A. Yes.

Q. After the December job, do you remember what you did next?

A. Let's see, I returned to New England [p. 53] to take some further training in ultrasonic welding inspection.

Q. So you had Christmas in New England?

A. Yes.

Q. How long was the training session?

A. Actually, I didn't have Christmas in New England. Actually, I left here January 1st. That would have been in February and March.

Q. Of '93?

A. Yes, February and March of '93.

Q. Do you remember when you returned to Professional Divers of New Orleans?

A. That was in April of '93.

Q. Let me show you this first one that I do have, which is dated May 11th of '93. Do you recall doing any work or dives for Professional Divers of New Orleans before that job?

A. Yes.

Q. Do you remember what they were, if you can recall?

A. It was on the Westbank. We were working off a diesel marine derrick barge searching for – there were three individuals [p. 54] who had fallen overboard during an accident on the vessel REGULUS. There are two Navy service vessels that are kept on the Westbank, drive-on/drive-off vessels that are stored there. And there was an accident where three crewmen fell into the water, and one was saved and two were missing. So we were called in to do a search and recovery there.

Q. In the channel itself?

A. In the Mississippi River.

Q. So this was more of a rescue situation?

A. It would be called a search and recovery, and because of the current and limited visibility, it was beyond the scope of the rescue squad in New Orleans, apparently, to handle it.

Q. What did you do after that?

A. After?

Q. After that search and recovery job?

MR. VALE: You got more?

MR. WILLIAMS: Yes, these were produced by the lawyer for LWCC early on. I'm just looking at [p. 55] them. They start back in November of '92. I think they're still in chronological order. Also, I think I might have pulled December and January out of there so just be aware of that. This is the only copy I have, but you can use it if you need to or want to.

(DISCUSSION HELD OFF RECORD)

EXAMINATION BY MR. VALE:

Q. Your attorney has provided me with additional records in regards to your dives with the Professional Divers of New Orleans. What were these records called, what did you guys call them in the field?

A. They would be referred to as dive sheets.

Q. And we see here the first dive sheet, looks like the date is 4 November '92?

A. Okay, yeah.

Q. And that might have been the one for East Bay, although you said October?

A. Yeah. I may have gotten a call about it in the end of October.

Q. So this one was possibly the first dive sheet representing your employment with Professional Divers of New Orleans?

[p. 56] A. Yes.

Q. And this dive sheet dated 7 November '92 is the one that you signed; is that correct?

A. Yes.

Q. And this one is still for the East Bay work, you think?

A. Yes.

Q. And is there typically a back to these that show the time you spent diving and the bottom time and all that sort of thing, is there a back to these dive sheets, or is that the complete deal?

MR. WALKER: There is sometimes a front to the dive sheets.

THE WITNESS: Typically, yeah. These show – I can't recall at this time.

EXAMINATION BY MR. VALE:

Q. You don't recall whether or not there would be a –

A. The deeper air jobs would have had a back. The shallower air jobs would typically not, unless they were out of forms.

[p. 57] Q. Okay. But this one dated 7 November '92 is with your signature on it; is that correct?

A. Yes.

Q. And how many dives does that one show that you made on that dive sheet?

A. Let's see, this shows one dive.

Q. According to that dive sheet, to what depth did you dive?

A. According to this sheet, 24 feet.

Q. Would there be any decompression time required for a dive to 24 feet?

A. No, only a controlled descent.

Q. Let's go to the next one. Another one dated 11/8/92, and is that your signature again, Mr. Wisner?

A. Yes.

Q. Whose signature is next to the supervisor's blank or signature line, if you recall?

A. Can I look at this?

Q. Sure.

A. I think from the other sheet I saw that it would have been Lee, I believe that's Lee Walmark's signature.

[p. 58] Q. How do these sheets get filled out by you and Mr. Walter or the dive supervisor?

A. Typically, the dive supervisor or the lead diver will, that runs the dive at the control console, will fill out

the data on the dive sheet up to the decompression schedule, if it's required, and then the tender would or an in-water decompression would be filled out by the diver at the control console or the relief diver or supervisor, and the tender would fill in any chamber stops. Since this does not have chamber and did not require chamber stops, the tender did not fill this, wasn't responsible for that.

Q. You would be asked to sign this dive sheet upon completion of the dive?

A. Upon completion of the dive or decompression.

Q. And did you ever have problems with the dive supervisor or the tender in regards to them putting down different information than what you believed that the dive records should have had before you signed them?

A. I can't remember anything specifically at this time, but you would look [p. 59] at the dive sheet prior to signing it.

Q. Were you ever required or requested to sign a dive sheet that you did not agree with?

A. Not that I recall, no.

Q. So as far as the time you spent in the water, the time you spent on the bottom, and the in-water decompression that you would go through that was listed on these dive sheets, you would check it out and would not sign it unless it was accurate as far as you could tell?

A. Typically, yes.

Q. Would that be true for the decompression schedule as well, time in chamber?

A. Yes.

Q. Who would calculate the decompression time in the chamber?

A. That would be calculated by the, you might say, diver in command, or diver at the control console.

Q. Would you participate in, if you were the diver, would you participate in those calculations initially?

[p. 60] A. Prior to making a dive, you would know the depth and time of the dive plan.

Q. I'm talking about the time in the chamber when you came back up?

A. Typically, you would be told how much chamber time you would have prior to entering the chamber.

Q. And let's go back to the dive for a second. The job, let's just use an example that may or may not have anything to do with any of these dive sheets, or this case in particular. They wanted you to work at 60 feet, and that would require some decompression time in the chamber typically?

A. I can't recall off the top of my head without looking at a table.

Q. Assume it did.

A. Okay.

Q. And you had done a dive the day before, but you were now, as they say, clean?

A. Yes.

Q. You would go over the time that you would spend on this dive at the bottom with the dive master or dive supervisor before you would enter the water?

[p. 61] A. Yes.

Q. And so you would know the time that it would take to get to the bottom and the time that you would work on the bottom would be, say, 15 minutes, and then you would know that it was time to start ascending?

A. Yes.

Q. And when you went in the water and got to the bottom, the entire time you would be in communication with the dive supervisor or the tender; is that correct?

A. Yes.

Q. And so you would be able to talk back and forth and say I am now on the bottom or something to that effect?

A. Yes.

Q. Isn't it true that the dive supervisor or tender would have instruments in front of him where he knew where you were at all times as well?

A. He would know, know your depth and be the time keeper, yes.

Q. So he could sit there, the dive supervisor or tender could sit there, listen to you and talk to you and, at the same time, [p. 62] would know how long you were on the bottom and be able to time you on the bottom; is that correct?

A. Yes.

Q. And that's how sometimes he would begin filling out these dive sheets?

A. Yes.

Q. And then you would come up and get out of the water and he would say, okay, we want you in the decompression chamber for 30 minutes, and I'm making that time up, and you would then go immediately to the decompression chamber?

A. Yes. However, if you did have decompression, you would know that before you came out of the water, but basically that's how it would work.

Q. And while you were in there, would you go over the table or would you have relied on them to calculate it correctly, on a typical case?

A. Typically, I would know how many oxygen breathing intervals I had and would follow that, yes.

Q. So before you went in the water, you [p. 63] would know the time you were going to spend on the bottom, or the bottom time which also includes the time getting there; isn't that correct?

A. Yes.

Q. You would know the stops you were to make, if any, ascending?

A. Yes.

Q. And you would have a general idea of how much time you were going to spend in the chamber?

A. Yes.

Q. And when you were in there, then you would check it out a little more in detail, including the times that you would need oxygen?

A. Yes.

Q. Did you calculate the time in chamber at any time on these dives?

A. On these dives, no.

Q. You always left that to someone else?

A. Typically, you would check their work, but they would be doing the calculating or getting the material out of the dive tables.

[p. 64] Q. Let me ask you this question, were you familiar with the decompression schedules or the decompression table?

A. Yes.

Q. As well as the dive table?

A. Well, I don't quite understand that, because the context that you are using dive table and decompression.

Q. The bottom time and how long you are supposed to stay there and what kind of ascensions and stops you were supposed to have come from the Navy dive tables?

A. Yes.

Q. You are familiar with those?

A. Yes.

Q. Don't have them to memory?

A. Exactly.

Q. But if I handed you the Navy dive table chart you would say oh, I've seen this before, I've worked with this before?

A. Yes.

Q. Would that be the same for the decompression tables, that you have worked with them before?

A. Yes.

[p. 65] Q. Not memorized it?

A. Yes.

Q. Familiar enough you had a working knowledge of the decompression table?

A. Absolutely.

MR. WILLIAMS: Were they using Navy dive tables out there? We had earlier requested the dive tables and never received any information as to what tables.

MR. VALE: I think they all used the Navy dive tables. That's almost a given. Let me ask you that question.

EXAMINATION BY MR. VALE:

Q. Do you know what dive tables Professional Divers of New Orleans used on their jobs?

A. They had tables that were based on the Navy dive tables, but they also, what would be called, pad decompression time.

Q. They would add?

A. Add.

Q. There's the Navy dive table, US Navy dive tables, British dive tables, did you ever [p. 66] work with the British dive tables?

A. No.

Q. Did you work with any other dive tables other than what would be considered the normal US Navy dive tables while working for the Professional Divers of New Orleans?

A. They had apparently a proprietary set of dive tables that we were operating with.

Q. Which, in your opinion, added time to the decompression time?

A. It added oxygen to the decompression time.

Q. So they were actually more conservative than the US Navy dive tables as far as you could tell?

A. At this time, or at that time, I guess it appeared more conservative.

Q. And if there was decompression time, I think you already answered this but I want to get it clear, if there was time in the chamber, then you would not sign the dive chart, excuse me, the dive record until after you came out of the chamber?

A. That's correct.

Q. I'm going to ask you to look through [p. 67] these records and tell me the first time you see where

decompression time or chamber time was required on one of your dives?

MR. WILLIAMS: Go ahead and look and see if you can answer the question. But I'm concerned, I've got a lingering concern that we might not have all the records in this packet, which would include, like these do, a separate sheet that indicates the re-compression schedule. So if they're not complete, they're not going to be helpful in jogging his memory. I don't want him to get boxed in the corner on possibly incomplete records.

MR. VALE: I'm not sure if these are a full set either. I will check and see if there's any more. Obviously, you provided me with more than what I already had from counsel who had previously handled this case that somehow didn't make it to my file. What I'm primarily concerned about is the dive records where Mr. Wisner signed off on them, which we can tell are his and how complete they might be. And I have a Navy dive table.

[p. 68] MR. WALKER: Have they stipulated that is the table they're using?

MR. VALE: I can't say that or not. I thought they were using the Navy dive table. They would just, whether they did it in an arbitrary fashion or whether they have their own dive tables, added time to the Navy dive tables. I'm not sure. I think they just on their own, case by case, just added or padded the Navy dive tables. I don't think they have some formal extrapolation from the Navy dive tables where, you know, every number on the Navy dive table there's a separate number or different number that Professional Divers of New Orleans uses.

MR. WALKER: So what you are saying is you think they had the Navy dive tables and then may have taken those offshore and done some adjustment on each dive?

MR. VALE: I can't tell you what they really did, but that was my general [p. 69] understanding.

THE WITNESS: The third dive sheet indicates that in-water decompression –

EXAMINATION BY MR. VALE:

Q. What's the date of that one, in-water decompression?

A. 11/8/92.

Q. I'm looking for chamber time.

A. Okay.

(SHORT BREAK)

EXAMINATION BY MR. VALE:

Q. What's the first time, Mr. Wisner, that you were able to find, on these dive charts in front of you, dive records in front of you, a dive that required chamber time?

A. The first one I found on these records is number 14388 dated 11/28/92.

Q. And that's one that you signed off on; is that correct?

A. Yes.

Q. Would that indicate that, generally, the time in the water was accurate and the time in the chamber was

also accurate, as far as the time you spent working in the water and [p. 70] the time you spent in the chamber?

A. Could you repeat that question again?

Q. Since you signed off on that record, would that indicate that, generally, the time on that record is accurate in regards to the time you spent in the water and the time you spent in the chamber?

A. I'm having trouble reading some of the copy, because of the copying.

Q. Let me rephrase my question. Since you signed off on that record, would that normally mean that you reviewed the time on that record and that you agreed with the time you spent in the water and the time you spent in the chamber?

A. Yes.

Q. Are you trying, as you are sitting there, to determine the amount of decompression time required for your dive?

A. I wouldn't be able to do that from memory. I can't make out some of the numbers here because of the copy quality.

Q. So since you really can't tell from looking at that particular record, because of the poor quality of it, but generally, if you [p. 71] signed one of these records –

A. Yes, that's a fair statement.

Q. It would be a fair statement; is that correct?

A. Yes.

Q. Now, why don't you go through the records that you have in front of you, and – do you want these attached to the deposition since you are referring to them?

MR. WILLIAMS: Why don't we go ahead and identify them.

MR. VALE: Why don't we mark them as Wisner 1 in globo, and those are records previously produced by counsel for Professional Divers of New Orleans to request for production number 11. And we will just mark that whole series as Wisner Number 1. This only goes up to August of '93.

MR. WILLIAMS: I pulled two things out of there. The December – actually, I'm sorry.

MR. VALE: I'm trying to make sure it's a [p. 72] complete record right now.

MR. WILLIAMS: I don't know if it's complete or not. The only thing I had was I pulled out the December sheet. The January sheet I didn't get until a couple weeks ago from your paralegal.

MR. VALE: So, just for the record, what we have in Wisner 1 in globo is some dive records from November the 4th, '92 to August the 27th, '93.

EXAMINATION BY MR. VALE:

Q. Mr. Wisner, could you just confirm that for me?

A. That's from?

Q. November the 4th, '92 to August 27th, '93?

A. Yes, November 4th to August 27th.

Q. Could you look at that and just tell me how many dives in that series of records required chamber time, as far as those records reflect? Generally, how many dives in that group that we've listed as Wisner 1 required chamber time?

[p. 73] A. 15.

Q. Do you recall at any time while working for New Orleans Professional Divers, and I always get it backwards, Professional Divers of New Orleans, but you know who I'm talking about, at any time, regardless of the records you just reviewed, did you have any problems, say, up until November of '93 with any problems as far as getting hits or becoming ill from any of your dives or any problems associated with your diving with Professional Divers of New Orleans, and I've deliberately limited it up until November of '93, because the incident for which you've sued was in '94, and there may be something about the December of '93 dive that I'm not aware of yet. So that's why I've limited it up until November?

A. I don't recall any incidents like that.

Q. And as far as you know, generally speaking, did Professional Divers of New Orleans accurately calculate the time necessary for you to be in a chamber following your dives?

[p. 74] A. Yes.

Q. When this case goes to trial, are you going to say those guys out there didn't know what they were doing and they were always trying to shortchange me on my

chamber time and it was just one bad situation and they made me sign all these records, did that ever occur?

A. No.

Q. Were they generally a safe company to work for?

A. From my experience, other than these incidents, I can't say that they seemed any less safe than other companies that I had worked with.

Q. Did you ever experience a time when they did, in my vernacular, shortchange you in regards to the time required in the chamber that you can recall?

A. I can't recall, no.

Q. And these dive records that you've looked at from November of '92 through August of '93, these were jobs for different companies in different locations; is that correct?

[p. 75] A. Yes.

Q. And as you previously indicated, when you worked on the vessel, it was primarily to work in regards to your diving operations and not with respect to the navigation of the vessel; is that correct?

A. Yes.

MR. WALKER: I think those are the same things. Go off the record.

(DISCUSSION HELD OFF RECORD)

EXAMINATION BY MR. VALE:

Q. Now, on your right side is the Wisner Number I Exhibit, and what I'm showing you now is what I had

previously put in front of you, which is my records, and the last one in my stack, in front of you at the present time, is the August 27th, '93 dive?

A. Yes.

Q. The next one I have is December of '93. Do you recall any dives between August of '93 and December of '93 for Professional Divers of New Orleans?

A. Yes.

Q. So my records are incomplete in your [p. 76] opinion?

A. Yes.

Q. How many dives did you do, if you can recall, between August of '93 and December of '93?

A. I would, let's see, between August and December?

Q. Approximately, I'm not trying to pin you down on this, I'm trying to get an idea?

A. Approximately, a dozen.

Q. More than one a month then?

A. Yes.

Q. Do you recall what kind of dives these were?

A. I remember one particular job that was relatively shallow, say, within about 15 feet of water. And there was a series of dives over, if I recall, roughly a week.

Q. Between August the 27th, '93, which is the last dive in the records that you've looked at, up to, but not

including, the December 12th, '93 dive, did you have any problems, did you get sick in any way, or associate any health problems with any of the dives that you did for Professional Divers of [p. 77] New Orleans?

A. I remember I had gotten an infected toenail, and it just went away.

Q. Anything else?

A. No, I can't recall anything at this time, no.

Q. I want to show you now the December 16th, '93 dive. And before I ask you any questions in regards to this dive sheet, do you recall doing any dives in December before this one, trying to find out when was your last dive, if you can recall, before the 12/16/93 job?

A. No.

Q. No you don't recall, or no –

A. I don't recall.

Q. So you don't know if you dove at any other time in December before this time or not?

A. I can't recall right now, no.

Q. And the dive sheet you are looking at now is for 12/16/93?

A. Yes.

Q. And where was this job, according to the record?

[p. 78] A. Main Pass, Block 123.

Q. And would that have been the state waters or outside the three mile limit, if you know?

A. I don't know. I would have to look at a chart to know that.

Q. And what was the work that was to be performed?

A. Recovering drill string from a small scale drilling ship.

Q. How many days did you spend out there, if you recall?

A. I would estimate, based on what I have here, approximately, a week.

Q. The 12/16/93 record says diver Doug Wisner, and you signed that form; is that correct?

A. Yes.

Q. The next one I have is 12/17/93, it says diver, Doug Wisner, but there is no signature, can you explain why there would be no signature?

A. Could be a lot of reasons. Probably generally the pace of the job, sometimes paperwork, that's the nature of divers to be [p. 79] concentrating on the work and take care of the paperwork later.

Q. Also, for 12/17/93, it says diver Doug Wisner, the date is filled in underneath the diver's signature, but it doesn't appear the diver or the supervisor signed off on it; is that correct?

A. Yes.

Q. On the 12/17/93 dive it appears that there was chamber time?

A. Yes.

Q. And that's signed off by the chamber operator, but not by you; is that correct?

A. Yes.

Q. Is that your handwriting where the name Doug Wisner is filled in or do you think that might be the chamber operator's handwriting?

A. It's not mine. It could be the chamber operator, or perhaps the dive supervisor.

Q. Did anything occur on this job 12/16 through 12/17 that resulted in you noticing any problems of any kind?

A. I recall having extreme fatigue.

[p. 80] Q. Anything else?

A. Primarily fatigue.

Q. Did you report that to anyone?

A. Not at that time, no.

Q. Did you go see any doctors in December of '93 for that condition?

A. No.

Q. And when did you become aware of this extreme fatigue following this incident, by that, did you notice it at the time and have always recalled being extremely fatigued for this dive, or has it only been recently that you now remember and looking back that you seemed to have some problems which you've identified as being

extremely fatigued from that job, if you understand my question?

A. I recall being extremely fatigued, but reluctant to make an issue of it at the time.

Q. Why?

A. Primarily because you want to be able to keep – to make money, I guess. It's just not at the date you wouldn't be feeling like you are making your wage, and at that time the job had wound down and we were coming back in. [p. 81] So I didn't really – it's easy to kind of shrug stuff like that off at the time.

Q. And following this dive, is that when you went back up to Berkshire for the additional schooling?

A. No, that was in February of '93, so it would have already occurred.

Q. Did you do any diving between this job, and when I say this job, the December 16-17, '93 job, and the January 14, '94 job?

A. No.

Q. Why don't we go ahead and mark the December 16 and 17, '93 dive records as Wisner Number 2, for the record. What did you do between the December '93 dive and the January '94 dive?

A. I recall attending a Christmas party here at PDNO, and looking to find an apartment in the New Orleans area.

Q. Were you still suffering from fatigue, say, by Christmas of '93, or had those symptoms seemed to have passed?

A. By that time, that had passed.

Q. So the general fatigue lasted for some time following the December 17, '93 dive, [p. 82] but not up through Christmas?

A. No.

Q. And did you notice any other symptoms other than extremely fatigued?

A. No.

Q. So you had essentially a pleasant Christmas and the new year, and then you're called in for another job with Professional Divers of New Orleans in January of '94; is that correct?

A. Yes.

Q. And you had seen no doctors between the December '93 dive and the January '94 dive?

A. No.

Q. Let me show you two documents, one is dated January the 14th, '94, and the other one is dated January the 15th, '94. Are you familiar with this document that I'm showing you now that we will mark as Wisner Number 3?

A. No.

Q. So if I represented to you that this is more or less the job ticket, you are not familiar with this form; is that right?

A. That's true.

[p. 83] Q. Which shows the people that are going out and the equipment, that sort of thing; is that right, you are not familiar with that form?

A. No, that's not something that I dealt with typically.

Q. Next I want to show you the January 15 record, which begins another dive sheet for you; is that correct?

A. Yes.

Q. And is that when you started working in 1994, was on January the 15th?

A. Yes.

Q. As far as you can recall?

A. Yes.

Q. And were you feeling fine by January the 15th, '94?

A. Yes.

Q. You felt that you were fit to dive at that time?

A. Yes.

Q. And where was the work?

A. It was – it indicates WD, which I believe is West Delta, but I can't recall without looking at the chart.

[p. 84] Q. Were you working on a vessel at that time?

A. We were working on Platform 73.

Q. That was a fixed platform?

A. Yes.

Q. I want to show you a series of photographs. Can you tell me whether or not you can tell whether or not those photographs show the platform on which you were working at the time of your alleged incident?

A. Yes.

Q. Those are photographs of the platform from which you were diving at the time of your alleged incident; is that correct?

A. Yes.

Q. We will go ahead and mark those as Wisner Number 5 in globo, and Wisner Number 4 will be the dive sheets for the January '94 dive, in globo. And I will make those photographs available to plaintiff's counsel as soon as I can.

Let me just go over these photographs for a second. I haven't marked them at all, but in a lot of these photographs you can see the chamber; is that correct?

[p. 85] A. Yes.

Q. And the chamber, I will go ahead and mark this as Wisner PDNO Photograph 1, which is part of the Wisner Exhibit for this depo. In PDNO Photograph Number 1, is that white cylinder, not far off the surface of the water, is that the dive chamber?

A. Yes.

Q. So a dive chamber was located on this fixed platform for your work; is that correct?

A. Yes.

Q. And then in some of the other photographs you see a much better view of the dive chamber; is that correct?

A. Yes.

Q. And you also can tell from these photographs that this is a fixed platform?

A. Yes.

Q. Meaning it's attached by legs to the bottom?

A. Yes.

Q. Why don't you take me one day at a time through your dive record then, and tell me, I assume you can recall some of the time that you were out on this dive from memory; is [p. 86] that correct?

A. Well, the details are kind of hazy at this time, because that was over two years ago, but –

Q. What I would like you to do, if possible, is go through the records and then, if you recall anything, in addition to what those records show, then just add to that, if that's not too much trouble. In other words, the dive sheets are only going to tell us certain times that you were in the water and that sort of thing, but until we get to the second or third day, and how you started feeling ill and all that. I just basically want to go through these dive sheets with you and if you say oh, yeah, I remember that and such and such happened, that sort of thing. If you just add into these dive sheets before you began noticing your problem, that's all I really want to do with you at

this time in regards to the January dive. Do you follow me?

A. Okay, because this is a copy of the same sheet. But as I recall, we left New Orleans, drove to Grand Isle where we got on [p. 87] the crew boat and traveled all night to the job site.

Q. Had you ever been on that crew boat before, if you recall?

A. I don't know.

Q. What did you do on that crew boat from the time you left Grand Isle until you got to the, fixed platform?

A. Bounced around a lot. It was rough, as I recall, that night.

Q. Sat, slept, ate?

A. Sat, didn't do any eating, but just tried to get some fitful sleep.

Q. All right. What did you do when you arrived at the work site?

A. Re-checked my gear, assisted in off-loading the equipment from the boat to the platform. I remember we had some safety meetings, both with Exxon, it was their general policy to have, as I recall, a daily meeting. We had meetings covering the scope of the work. Assisted in setting up equipment. And I recall getting suited up to be standby diver, and making my dive.

Q. Which is reflected on the dive sheet [p. 88] in front of you?

A. Yes.

Q. And how deep did you go or what was your bottom time on that first dive as far as that record reflects?

A. It shows 35 minutes.

Q. So what depth?

A. Actual depth, according to this, is 157 feet.

Q. And did that require stops on the way up?

A. Yes.

Q. And would you tell me what those were?

A. Four stops at 60, 50, 40 and 30 feet.

Q. Say that again.

A. First stop was at 60 feet.

Q. 60, 50, 40 and 30?

A. Yes.

Q. The first stop was at 60?

A. Yes.

Q. For how long?

A. Three minutes.

Q. And how long at 50 feet?

A. Five minutes.

[p. 89] Q. And how long at 40 feet?

A. Seven minutes.

Q. And how long at 30 feet?

A. Eleven minutes.

Q. And again, as far as you would be able to testify, those times at those stops would be accurately reflected by that dive sheet; is that correct?

A. Based on this schedule, yes.

Q. Would those stops comport with the US Navy dive tables?

A. That's not on this table.

(INDICATING)

MR. WILLIAMS: Why don't we make clear for the record what the witness has been handed.

MR. VALE: I've handed him a –

MR. WALKER: Can I take a look at this first?

MR. VALE: Sure. Let's forgo using this right now, which is a chart I picked up.

EXAMINATION BY MR. VALE:

Q. Did that first job require time in [p. 90] the chamber?

A. Yes, it did.

Q. Do those records reflect the time in the chamber?

A. It does show chamber time here on the back.

Q. Let's go to the front page again. What time did you enter the water, according to the dive sheet?

A. 1023.

Q. A.M.?

A. Yes, that would be in 24 hour time, military time.

Q. And what time did you leave the water?

A. Reached the surface at 1132.

Q. So that's at night?

A. No, that's also in the morning.

Q. All right. So that's a.m. here. And what time did you enter the chamber, according to these records?

A. Okay, was in the chamber at 1135 and was at depth at 1136.

Q. Can you read off the sequence in the chamber?

[p. 91] A. It was 50 feet for ten minutes breathing oxygen. Arrived at 1136. Left at 1146. Breathed air on an ascent from 50 to 40 feet in the chamber. Left at 1147, excuse me, reached at 1147 and leave at 1152.

Q. That would be five minutes?

A. Yes. Arrived at 40 feet in the chamber at 1152 breathing oxygen, left at 1212, that would be a changeover to breathing air for five minutes from 1212 to 1217. Breathing air again, or excuse me, oxygen at 40 feet from 1217 to 1237. Breathing air at the same depth from 1237 to 1242. And an ascent from 40 feet while breathing oxygen. Left 40 feet at 1242 and reached the surface at 1302.

Q. At this point in time, do you have any dispute with the accuracy of those records with respect to the

time you spent in the chamber and the sequence of events in the chamber?

A. Could you ask the question again?

Q. Do you dispute, in any way, the records on that dive sheet regarding the time in the chamber and the sequence of events in [p. 92] the chamber at this point in time?

A. Not to the best of my recollection.

Q. Mr. Wisner, all I'm trying to find out is when we go to trial in this case and I show you that sheet, are you going to say oh, no, these times were all made up. That chamber operator didn't have a clue as to what was going on, et cetera, et cetera. I'm just trying to find out if you dispute those times?

A. No, I wouldn't dispute it. It seems to be reflecting what occurred.

Q. And when you exited the chamber and, say, for the next eight hours, did you notice any problems?

A. As time passed, I would estimate about ten hours later is when I started to feel different.

Q. Was this your only dive out there prior to you being taken back –

A. Yes.

Q. – to the shore?

A. Yes.

Q. So you didn't do any other dives, get in the water at any other time other than what's reflected on that dive sheet?

[p. 93] A. That's correct.

Q. And you don't really dispute the information on that dive sheet; is that correct?

A. No.

Q. And it's about ten hours after this dive that we've just gone through that you began noticing problems; is that correct?

A. Yes.

Q. What did you do for that period of time up till you beginning to notice something?

A. I took a shower, got something to eat. I recall telling the supervisor that I did seem to have some trouble with air ventilation through my helmet.

Q. Who did you tell, was it Cascante?

A. It would have either been him or Jerry Ford.

Q. You don't recall at this point?

A. I can't recall. I know I also had another conversation with one of the other divers pertaining to that, too.

Q. When you were on the bottom, did you tell your dive tender that you were having [p. 94] problems, or was it only after you got out of the water and said, you know, it didn't seem like everything was going on?

A. I remember mentioning it while I was diving because I said I had to stop and ventilate the diving helmet.

Q. After taking your shower and eating, what did you do next, before you began noticing things?

A. Took a walk around the platform, and I remember looking to see if the tenders had taken care of my gear and stowed it and cleaned my wet suit and so forth.

Q. Much stair climbing between the dive and what you noticed about ten hours later?

A. Yes.

Q. A lot?

A. Yeah, because I was walking around the heli deck just as some exercise, and I remember one of the Exxon people saying they didn't allow that, but I could walk around the deck of the quarters, and that had stairs that went up and down.

Q. And where were you when you began noticing something?

[p. 95] A. Watching television in the day room.

Q. What did you notice?

A. Kind of a subtle feeling that I wasn't quite connected to what was going on. It was an odd sensation.

Q. So what did you do?

A. Well, I was wondering if it was – if it was serious or I kind of rationalized that it was fatigue because we traveled that night, set up and did a lot of work. And I took note of it and thought, well, maybe it'd pass, it's just something –

Q. So how long did you feel this way?

A. Up until I notified the supervisor that I really didn't feel well.

Q. And when was that, approximately?

A. Oh, gee, I can't recall the clock time, but it was after I had stood as standby diver.

Q. It looks like you finished your chamber time around noon?

A. Yeah, it was 1302 it says here, so it would have been one o'clock.

Q. And you said you didn't notice anything until about ten hours later, which [p. 96] would be about 11 o'clock at night in the TV room?

A. Yes.

Q. And you said you felt this disconnect situation?

A. Yes.

Q. Did you go to sleep that night?

A. I can recall sleeping, but I can't recall if it was that night or prior nights.

Q. What I'm trying to find out is you said you had tendered for someone else before reporting in to your supervisor?

A. Yes.

Q. So what I'm trying to find out is did you get a night's sleep and then work as a tender and then report it, I'm just trying to get the sequence of events here, if you can recall?

A. The details are fuzzy to me right now.

Q. Fair enough. And who did you report this situation to when you finally did think it was important enough or realized that you wanted to report it?

A. To Joe Cascante.

[p. 97] Q. To Joe?

A. Yes.

Q. And what did you tell Joe?

A. I told him that I felt odd and dizzy and short of breath.

Q. And where were you when you told him this?

A. I believe it was either in the day room or the galley. I remember I walked in the doorway into the quarters, but I can't recall which room it was.

Q. I have what's called a first report of injury, which was filled out. In fact, I can give you – it says in part, approximately, 21 hours after making a dive to 165 feet, Wisner felt light headed and dizzy and slightly out of breath. Do you think that's about when you reported it to your supervisor, approximately, 21 hours after you had completed your dive?

A. Yes.

Q. We will go ahead and mark that Wisner 6 as the next exhibit in sequence. So what happened after you reported it?

A. They had – they gave me a field [p. 98] neurological exam, and then put me in the chamber, and I felt better. And after 30 minutes, they ran me on the treatment table.

MR. WALKER: Off the record.

(DISCUSSION HELD OFF RECORD)

EXAMINATION BY MR. VALE:

Q. Do you know what exactly they did for you on this second time in the chamber?

A. Well, it would run concurrently. They put me in the chamber under pressure, and then when I noted improvement, then they administered treatment table from that point rather than bringing me out again.

Q. Do you know how long you were in the chamber or what sequence occurred in the chamber?

A. Without – it would be according to the treatment table. I can't say off the top of my head. Nobody really memorizes that kind of thing.

MR. VALE: Off the record.

(SHORT BREAK)

EXAMINATION BY MR. VALE:

[p. 99] Q. Mr. Wisner, before we broke, we were talking about the time that you spent in the chamber after you had reported this situation to your supervisor. And you indicated that they had put you in the chamber, that you seemed to get some relief, and so they ran you through some sort of schedule; is that correct?

A. Yes.

Q. You don't know what schedule they ran you through, or do you know what schedule they ran you through?

A. A table 6-A, table 6-A.

Q. How do you know that?

A. Because of the, what would you call it, it was pressurized to 160 feet.

Q. Did you learn it today or you knew that already that it was table 6-A that they used?

A. Well, from this sheet and recalling the events that –

MR. WALKER: For the record, so we can, we haven't seen an actual copy of that.

MR. VALE: [p. 100] I will see if I can find that, if it exists, and produce it.

EXAMINATION BY MR. VALE:

Q. I have a Diving Manual of Operations and Diving Practices from Professional Divers of New Orleans. Did they provide you with a copy of this manual when you went to work for them?

A. No.

Q. Did you have access to one of these?

A. Boy, I can't recall at this time. They – that's the first I've seen the manual.

MR. WALKER: Can I, for the record, formally request that we get a copy of that? Apparently, the other former law firm didn't send that over.

EXAMINATION BY MR. VALE:

Q. You say this is the first time you've ever seen this manual?

A. Yes.

Q. When you all had safety meetings or operational meetings, you wouldn't work out of the diving manual?

A. I don't ever recall seeing a copy of [p. 101] that manual in that form.

Q. Can you just page through it and see if you see anything in there that does look familiar where you might have been provided, you know, with pages of it, although it might not have been bound in that format? Just thumb through it and let the record reflect that he is only going to thumb through it very quickly and see if that is familiar.

MR. WALKER: Assuming that is the one that they had.

MR. VALE: Correct. That is the one that says 90 and was somehow in this file.

MR. WALKER: I think all he is asking you to do is identify whether you've actually seen this manual. He wants to make sure if you have, you have, and if you haven't, you haven't.

THE WITNESS: No, I have not.

EXAMINATION BY MR. VALE:

Q. When you all would refer to diving [p. 102] tables, do you recall what you would look at?

A. The supervisor had stapled sheets that were a dive table that had the PDNO logo on it.

Q. It wasn't as fancy as the one I have, this nice plastic?

A. No. It's like sheets of paper. Maybe a dozen sheets of paper stapled.

Q. That's what you worked from, too?

A. Yes.

Q. So, we've gone over your dive in January, we've gone through your chamber time, then you noticing symptoms, reporting it to your supervisor, and then re-entry into the chamber?

A. Yes.

Q. With more time, which followed table 6-A, and then what happened?

A. After the 6-A, I felt markedly improved, and I recall walking around, monitoring my body sensations or state. And that I felt pretty good at that point. And they had notified me they were going to be sending me in. So I was rounding up my diving gear and getting ready to have all my things [p. 103] together for when the helicopter arrived, and I remember getting a night's sleep and then the next day flying in to Grand Isle.

Q. It was by helicopter?

A. Yes.

Q. Did it stay low?

A. Yes.

Q. Did it purposely stay low?

A. Yes. They were aware that I had had a hit, and so they – the pilot was instructed to fly low.

Q. Okay. Were you sitting up during this flight?

A. Yes.

Q. Taken to Joe Ellen?

A. No, I met or –

Q. You went to Dr. Serio's office?

A. It was Mike Wills that met me in Grand Isle and drove to somewhere on the Westbank to get a drug screen, and then brought me to Dr. Serio's office.

Q. And how long did you wait there before you left?

A. As I recall, I arrived there, approximately, 2:30, maybe 3:00 in the [p. 104] afternoon, and at 5:00 he still hadn't examined me.

Q. And so then you went over to Joe Ellen?

A. Yes.

Q. Who recommended Joe Ellen or how did you find Joe Ellen, how did you get there, essentially?

A. A companion, who had stopped in and was going to drive me back to where I was staying, came in, and when I told him I hadn't had a chance to see Dr. Serio yet, he said, well, let's go over to Jo Ellen Smith and see if they can get you in right away.

Q. Who was that?

A. Bob Izdepski.

Q. Did he dive for Professional Divers, too?

A. I recall working on the job with him, but he was not a regular diver with PDNO.

Q. So then you saw Dr. Vanmeter, and he recommended more hyperbaric treatment; is that right?

A. Yes.

Q. Did you go through the entire plan [p. 105] that he recommended?

A. Yes.

Q. So you completed the schedule of treatments that he had prescribed, more or less?

A. Well, as it unfolded, I was given a treatment that day, and then I was released. And the following day I went in for, I think it was the following day, for subsequent treatments, and apparently, I believe my condition had worsened, and he had me admitted to the hospital.

Q. And while there, you developed tachycardia?

A. Yes.

Q. Was that the first time you had had tachycardia that you recall experiencing?

A. No, because I had had one incident previous to that.

Q. Did the whole thing, when I say the whole thing, all those symptoms that you experienced while on the rig and while being flown in by helicopter and for which you were treated by Dr. Vanmeter, did that seem to be more of a tachycardia episode, based on the [p. 106] fact you've had one previously and you've had some, unfortunately, some experience with them since that time, too?

A. No, because the condition had manifested itself differently. And at the outset it was very subtle and it seemed to progress.

Q. The first time you had a tachycardia episode was in '88?

A. Yes.

Q. That's when you went and saw Dr. Egan?

A. Yes.

Q. So the episode on the rig was different than the time that you experienced tachycardia in '88 and the time you experienced it in October of '95; is that correct?

A. Yes.

Q. Except for the fact while you were in Joe Ellen you actually did develop tachycardia?

A. Yes.

Q. And there you saw Dr. Kenneth Kerut, the cardiologist, do you remember that?

[p. 107] A. I can't recall him specifically, but I do recall seeing a doctor other than Vanmeter and Dr. Harsch.

Q. And you also saw or were evaluated by Dr. Harold Neitzeschman, do you remember him?

A. I don't even remember that name at this point.

Q. He might have just reviewed X-rays. Do you remember seeing Dr. James McKihne?

A. No.

Q. Who did you consider to be your heart doctor, if I can use that generic term, while in Joe Ellen, Harsch?

A. I would say so, because he was handling my whole – the case.

Q. Have you had anymore spect scans since the one in Joe Ellen in January of '94?

A. Could you explain what that is.

Q. This is the single photon emission computerized tomography test, they check your blood flow in your brain?

A. I recall having a test where I was given, on at least two occasions, a test where I was given an injection of a radioactive isotope.

[p. 108] Q. Right. Have you had that since?

A. Not since then, no. It was in that time period of that month or two months, whatever, at the time it was that that had been done, I think twice, maybe three times.

Q. You saw a Dr. E.B. Ross for an auditory brain stem test and a hearing test?

A. I remember the test, but I can't remember the names of the doctors. I do remember having tests, type of hearing test and being sat in a chair and tilted around.

Q. In February, while being treated with Dr. Harsch, you began having stuttering?

A. Yes.

Q. Can you explain that to me, if you can?

A. Not stuttering like du, du, du, or uh, uh, uh, but difficulty in word selection.

Q. Grabbing a word?

A. Grabbing a word. And I still find that when I'm under stress, for example, in meetings, in work situations sometimes, I seem to have a little trouble expressing myself or trouble expressing myself.

Q. You know there's a word there but you [p. 109] can't seem to grab it and use it?

A. Yeah. I guess that's about like having a word on the tip of your tongue.

Q. Right. Did you seem to improve with the hyperbaric treatments?

A. Yes.

Q. To the point that you became asymptomatic at any stage, meaning you didn't have any symptoms?

A. No. I reached a point where I plateaued and it seems as though subsequent treatments didn't create more improvement. And Dr. Harsch, at that point, said that I had plateaued and that further treatment really would not cause any further improvement.

Q. When did you leave the New Orleans area following your treatment initially for this episode or this incident?

A. Approximately, March. I believe it was in early March. It was subsequent to the final treatments, within, I think, a day or two days after that.

Q. When you went on this dive in January of '94, you were still a certified diver and had not lost any of your certifications; is [p. 110] that correct?

A. That's correct.

Q. Realizing that you are not an expert, but following the sense and reviewing what you have reviewed, in your own opinion, what do you believe that New Orleans Professional Divers did or failed to do that caused or contributed to this situation?

MR. WALKER: The only objection I will make to that is the extent that it calls him to do some kind of medical evaluation of certain dive tables.

MR. VALE: Fine.

EXAMINATION BY MR. VALE:

Q. Just trying to learn here today what, if anything, Mr. Wisner believes that is blameworthy in this case associated with Professional Divers of New Orleans?

A. I think that it's possible that the low air delivery pressure that I experienced could have a bearing on it. That my decompression was, my water stops, I was especially cold because of the flow of river [p. 111] water through our work area, the work site. The chamber, during my chamber run I was also very cold, and feel that there was a delay in being evaluated when I came in from offshore, because I ended up sitting in Dr. Serio's office for what I thought was an unduly long amount of time. Right now, that's all that comes to mind.

Q. With respect to the low air delivery, had you ever experienced that on any occasion before the January '94 dive?

A. Not working for PDNO.

Q. For others?

A. I had experienced that sensation with other contractors.

Q. Did this result, on this occasion in January of '94, from faulty equipment, or is it something that occurs from time to time, or is it operator fault, if you know? What could be the potential causes for this?

A. Improper adjustment of the VD pilot valve on the compressor. It hasn't been brought – resolved to my satisfaction, if the proper spring had been used in the VD pilot valve.

[p. 112] Q. Had you checked that after this incident when you say you haven't been satisfied on that? It implies to me at least you did some checking on that already.

A. Well, I brought it to the attention of my supervisor, and subsequent adjustment, apparently, had been made, at least I'm told that. But,I didn't make a subsequent dive because of this incident.

Q. I'm sorry, what?

A. I'm having trouble explaining myself. I notified the supervisor that I had experienced that trouble.

Q. When?

A. After my dive, and also during the dive I mentioned that I had to stop to ventilate my hat. But as I understand it, I was told that they had made an adjustment after, I guess, somebody else had also mentioned this to them, and the diving supervisors had corrected the problem after we brought it to their attention.

Q. Was there anything else with respect to the low air delivery situation, as far as potential causes, other than the two you've [p. 113] just mentioned, improper adjustment of the valve or spring?

A. It could also be due, perhaps, to a collapsed umbilical, but I don't know if that was an issue in this particular case. In other words, there's another potential cause that could be something that would have to be looked at to see if that was a problem.

Q. How long did you experience a low air delivery situation?

A. Throughout the course of my dive, I had had – typically, I have not experienced trouble previously, and I had to stop several times during the course of the dive to ventilate my diving helmet.

Q. How would you do that?

A. By turning open the free flow valve rather than breathing through the demand valve.

Q. And when did you first start experiencing this problem?

A. When my workload increased.

Q. So you were on the bottom already?

A. At the work site, which was a little bit off the bottom.

[p. 114] Q. Did you tell the tender or ask the tender can we terminate this dive and start bringing me back up at this point, and did you feel that it was that sort of a situation that the dive should have been terminated once you experienced this problem?

A. That thought crossed my mind, but then after I ventilated and turned my air back down, I was able to, if I didn't work real, real vigorously, I was able to continue handling the tools. But what I'm trying to say is I was hindered at being able to work at maximum output by the fact that I had to monitor my air supply.

Q. Did it happen again where you had to ventilate your helmet?

A. Yes.

Q. How many times did you have to do that?

A. I would estimate three times.

Q. All while you were working?

A. Yes.

Q. But at none of these occasions did you feel that you wanted to terminate the dive?

[p. 115] A. Well, quite honestly, it did cross my mind, well, should I, and I was weighing it. It's a hard decision to make.

Q. Did you ever terminate the dive?

A. No, I did not terminate that dive.

Q. And so then you finished working and you began your ascent?

A. Yes.

Q. And you said that you were rather cold at the different water stops?

A. Yes.

Q. What would you have preferred at these stops, less time, more time, or –

A. I would have preferred that there had been auxiliary heating in the form of hot water. You can't cut the schedule short because of the –

Q. Right. How would they have delivered hot-water to you?

A. By hose.

Q. Did you ask for it?

A. We didn't have the means of providing it.

Q. How did you descend and ascend, were you in a personnel carrier or did you just [p. 116] descend down the line?

A. Well, from into the water, by the ladder, and they had an open bottom diving bell that would descend to within about 15 or 20 feet of the work site.

Q. Is this the one with the kind of plexiglass top to it?

A. Yes.

Q. And you could actually get up in there in an emergency situation?

A. Yes.

Q. And it has seats, and sort of sit there?

A. Seats of sort of like fold-down jump seats.

Q. So you would have preferred to have had hot water delivered to you while you were on these stops?

A. Yes.

Q. How do you feel that might have contributed to your problem?

A. Not having the hot water?

Q. Being cold?

A. According to the literature, it interferes with a transfer of gas from – [p. 117] through your lungs and out of your body.

Q. And so when you got in the chamber, do they have blankets in there?

A. Yes.

Q. And is it heated?

A. No, it's not heated.

Q. And you stayed cold in there?

A. Yes.

Q. So there's that potential again that because of your body being cold, it didn't have the same mechanics to process the gases through your system?

A. Yes.

Q. But you don't know if that really occurred or not; is that right?

MR. WALKER: I'm going to object to the form of the question, just to the extent that we are-getting into some – our medical experts will be able to shed some light on a lot of things.

THE WITNESS: I don't really have an answer to that other than what I've read in the literature.

[p. 118] EXAMINATION BY MR. VALE:

Q. And then you believe the delay in your evaluation might have had some contribution to your overall symptoms?

A. Yes.

Q. Can you think of anything else, now that we've gone through those issues, at this point in time, sitting here today?

MR. WALKER: Talking about which dive, the January?

EXAMINATION BY MR. VALE:

Q. Yes, the January?

A. Well, at this point, that I would like to be able to reserve and bring up if something else comes to mind.

Q. That's why I limit it to today. Going back to the December dive, do you recall anything unusual or blameworthy on the part of Professional Divers of New Orleans which you believe might have resulted in you feeling extremely fatigued?

MR. WALKER: Once again, I will object to the point that it makes him delve into, and you [p. 119] can answer completely, just tell him what you think.

THE WITNESS: I recall a delay in being able to gain the dive ladder at the end of that dive. We were working with two vessels tied together, so we're concerned to keep the diving umbilical between the two vessels, but where we had the ladder tied up, I recall having trouble getting, reaching, getting onto the rungs of the ladder, because as it was rolling, sometimes it would be one rung in the water, and other times the boat was rolling. It was difficult to grab onto it.

EXAMINATION BY MR. VALE:

Q. This would have been on the surface of the water?

A. Yes.

Q. And you think that your struggling and working to get to the ladder and up the ladder might have caused your fatigue or contributed to your fatigue symptoms?

A. It delayed me in being able to get into the chamber and back down within the prescribed five minutes.

[p. 120] Q. So you think you were on the surface and not in the chamber within the recommended five minutes on your December dive?

A. Yes.

Q. The 12/16 dive or the 12/17 dive, do you remember which one you were struggling with, or both?

A. It's difficult. I can't recall exactly which specific dive, but the configuration of the dive station remained the same throughout the course of the work.

Q. Have you had any accidents or injuries of any kind since January of '94, automobile accidents, trip and falls, work-related incidents, anything where you sustained any kind of injury of any sort where you've sought any kind of medical treatment? That's a pretty broad question, but it's purposefully broad, other than the incident in Kankakee, Illinois.

A. Other than that, no.

Q. You returned to work at Professional Divers of New Orleans following your incident?

A. I spent one day working in the office.

[p. 121] Q. You didn't do light duty work at any time?

A. Well, working in the office, I guess, would be light duty.

Q. Why did you only work one day?

A. Because after going back for further treatments with Dr. Vanmeter, then he admitted me to the hospital.

Q. Who has paid for all of your medical expenses?

A. I don't know.

Q. You haven't paid anything out of your own pocket?

A. No.

Q. Did you receive any compensation benefits or any other kind of benefits from Professional Divers of New Orleans or any of their insurance carriers since then?

A. No.

Q. Did you receive any Social Security disability at any time?

A. No.

Q. Did you apply for Social Security disability, if you know?

A. I recall that upon returning to [p. 122] Massachusetts, checking with some vocational rehabilitation commission, but after being offered a job with Son Sub to go out on contract with them, I dropped that.

Q. I want to show you now your application, or pre-employment application or physical before starting work with Professional Divers of New Orleans. You've seen that form before?

A. Yes.

Q. And who is the physician that filled that out or you went to to have that filled out?

A. Dr. Serio.

Q. And you told him about the ADS surgery; is that correct?

A. Yes.

Q. Let me look at it for a second and see-if there's any questions that I have. Did you fill out this information, especially the check marks regarding your medical history?

MR. WALKER: We don't want you to speculate.

EXAMINATION BY MR. VALE:

Q. No, don't speculate. I'm just asking [p. 123] for the check marks on the medical history right now, where it says yes or no to all sorts of different conditions?

A. Yes.

Q. Did you check that out?

A. Did I check?

Q. Did you make those checks?

A. I believe so, yes.

Q. I would assume you are right-handed?

A. Yes.

Q. It says here you passed an oxygen tolerance test, what does that mean?

A. It means that you are in a chamber at 60 feet for an hour breathing oxygen and that you didn't go into 02 convulsions.

Q. And you tell Dr. Serio that you did not have any problems diving in the past, including gas embolism, oxygen toxicity, eardrum rupture, deafness, lung squeeze, near drowning asphyxiation, et cetera; is that right?

A. Yes.

Q. It appears the date of the examination was October 27, '92?

A. Yes.

[p. 124] Q. Did he explain to you what he meant by splitting of the second sound, occasional PVC with your heart?

A. I believe he did, but I can't recall exactly what it means at this point.

Q. Now, you also had a physical in '93?

A. Yes.

Q. And who did that one?

A. Dr. Peter Stob.

Q. Where is he located?

A. Was it Emergency Physicians on Lapalco Boulevard? I think it – was it Marrero? It's on the Westbank.

Q. You told him, too, about your prior surgery?

A. Yes.

Q. What did he do in regards to his evaluation on that occasion, if you recall?.

A. I believe he asked me about my diving history, and I had to take a stress EKG test, also, for that physical.

Q. Did you fill out a new history for this physician when you applied for this, when you went for this physical?

A. What I did, because I would – he did [p. 125] not have an ADC form. I whited out the areas that were –

that he would have to sign, but otherwise I left the things the same that were the same.

Q. So you changed the date on the '93 ADC form from the 1992, but otherwise, used the same material?

A. Yes.

Q. So that's why if we compare the '92 history dated December the 27th, '92 with the November 18th, '93 history, except for the dates, the form looks identical?

A. Yes.

Q. You did that on purpose?

A. Yes. That was because I couldn't get a form from the ADC soon enough to be able to get the – in time to get into the appointment.

Q. Did any of these physicians, and again, I'm being very broad in my question, that you had seen prior to December of '93, ever tell you that it was unwise, unsafe, not prudent, or in any other way recommend that you not dive?

A. Let's see, I had the exam with Dr. [p. 126] Serio, he had a question about a pulmonary function test, and after – he did say that prior to a closer exam at another doctor, that he wouldn't pass my physical. But he arranged the test, I went and took the test, and that doctor, whose name I can't recall, but it should be reflected in their records, didn't have a problem with it. And subsequently Dr. Serio approved my test.

Q. But my question, again, is prior to December of '93 –

A. Saying not dive at all?

Q. No, did any doctor ever suggest in any fashion that you should not be diving?

A. No.

Q. Did any of those physicians that you saw prior to December of '93 ever suggest that you should limit, in some fashion, your work as a commercial diver?

A. No.

Q. So as far as you know, you were fit for duty prior to December '93?

A. Yes.

Q. Which included a '92 physical and a '93 physical?

[p. 127] A. Yes.

Q. I have to ask this question, and I don't mean to embarrass you. Have you in the last ten years been convicted of any crimes?

A. No.

Q. Did you think any of the tenders or supervisors working with you while you were employed lay Professional Divers of New Orleans was not competent?

A. I recall a tender that we had that I didn't think was competent, and it was very early on in working with them, and I know he didn't stay. I didn't see him after that particular job again.

Q. Specifically on your December '93 dive or your January '94 dive, did you feel that there was any less than

competent personnel out there working with you for Professional Divers of New Orleans?

A. By that time I had worked with, I think, most of those people there, and I had confidence in them.

MR. VALE: Thank you, sir. That's all I have. I would ask you to confer with your [p. 128] attorney and ask you if you would like to read and sign or waive that?

MR. WALKER: We will read and sign.

EXAMINATION BY MR. WALKER:

Q. Mr. Wisner, I'm going to hand you what has been represented as the December dive as dives for while working at Main Pass 123, and these are Bates stamped 18077, 18085, 18086. Mr. Wisner, I'm going to hand you those sheets and ask you whether you have any reason to doubt that those sheets were made contemporaneously on the job?

A. No, I would concur.

Q. And you have no reason to doubt the accuracy of those sheets, or do you have any reason to doubt the accuracy of those sheets?

A. I don't quite understand the question.

Q. Do you have any reason to doubt that these were made at the time? Let's go back. Do you have any reason to doubt that these sheets were made on the job?

A. Looking at this one, I would say no.

MR. VALE: [p. 129] No meaning what?

EXAMINATION BY MR. WALKER:

Q. No meaning yes or no? This isn't a tricky question. You can answer it anyway you want. Nobody is trying to trick you here. I'm trying to make sure that those get put as an exhibit, and later on you don't come back and say I.don't think these are the right sheets. Same reason counsel asked you earlier.

A. Well, I don't think – this didn't have my signature on it, but then again, there are times when dive sheets weren't signed. This doesn't have the supervisor's signature on it, or mine. These could be open to interpretation, I suppose. This one is signed and

MR. WALKER: Okay. Pass the witness.

(WHEREUPON THE DEPOSITION WAS CONCLUDED)

[p. 130] WITNESS' CERTIFICATE

I have read or have had the foregoing testimony read to me and hereby certify that it is a true and correct transcription of my testimony, with the exception of any attached corrections or changes.

I hereby acknowledge the foregoing to be true and correct on this the 8th day of July, 1996.

/s/ Douglas A. Wisner

WITH CORRECTIONS Douglas A. Wisner

WITHOUT CORRECTIONS _____

[p. 131] REPORTER'S CERTIFICATE

I, HUEY L. BANG, Certified Court Reporter in and for the State of Louisiana and the State of Mississippi do hereby certify that the within witness, after having been duly sworn by the Reporter to testify to the truth, the whole truth and nothing but the truth, did testify as hereinabove set forth in the foregoing pages; That the testimony was reported by me in shorthand and transcribed under my personal supervision, and is a true and correct transcript to the best of my ability and understanding;

That I am not of Counsel, nor related to Counsel or the parties hereto, and in no way interested in the outcome of this event.

/s/ Huey L. Bang
HUEY L. BANG
CERTIFIED COURT REPORTER
REGISTERED PROFESSIONAL REPORTER

Supreme Court, U.S.
FILED
JUN 28 1999
CLERK

No. 98-1908

IN THE

Supreme Court of the United States

PROFESSIONAL DIVERS OF NEW ORLEANS,

Petitioner,

v.

DOUGLAS WISNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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I

STATEMENT OF THE CASE

Throughout the appellate proceedings, including the writ application to this Honorable Court, Petitioner, Professional Divers of New Orleans ("PDNO"), has repeatedly distorted the facts of this case by exclusively focusing on the events of January 16, 1994, which took place on a fixed Exxon platform. Accordingly, Respondent, Douglas Wisner ("Wisner") offers the following recitation of the facts.

Wisner was injured in the course and scope of his employment with PDNO. (Pet. App. at p. 33, PDNO Memorandum in Support of Summary Judgment). Wisner worked for PDNO from November 1992 until shortly after an incident in January 1994. (Pet. App. at p. 46, affidavit of Larry Tomlinson). As PDNO pointed out in support of its summary judgment, PDNO's diving "records indicate that Wisner worked approximately 10% of his time on a fixed platform, while spending approximately 90% of his time working off of vessels during his employment with Professional Divers." (Pet. App. at pp. 39-40, PDNO Memorandum in Support of Summary Judgment). During this time, Wisner worked on approximately 14 different vessels owned by 12 different companies at the direction of his employer, PDNO. (Pet. App. at p. 40, PDNO Memorandum in Support of Summary Judgment). In Wisner's deposition, he testified that with regard to his vessel related employment, the vessel served as his work platform and provided his room and board. (Pet. App. at pp. 89 & 91, Deposition of Douglas Wisner). As such, with respect to each individual job, it can be said that Wisner was assigned by his employer, PDNO, to the vessel in question.

During Wisner's tenure with PDNO, during which PDNO has admitted that Wisner spent 90% of his time working on vessels, it has been alleged that PDNO's diving, safety and decompression procedures were inadequate and that as a result of these inadequate procedures, *Respondent was exposed to multiple negligent events during the overall course of his employment with PDNO which individually, severally and/or cumulatively, resulted in injury to Respondent.* (Plaintiff's First Supplemental and Amending Petition at ¶7). Although the final cumulation of these events occurred on January 16, 1994, the day after Wisner dove from an Exxon platform, PDNO's continuing negligence, which caused Wisner's injury, is alleged to have occurred over a period of time immediately predating the incident on the Exxon platform and during which Wisner was diving from vessels. (Pet. App. at p. 34, PDNO Memorandum in Support of Summary Judgment).

REASONS FOR DENYING THE WRIT

In light of the facts of this case, PDNO's phrasing of the question presented to this court is also factually misleading. A more appropriate statement of the question presented is:

> Can a purely maritime employee who is assigned by his employer to vessels, necessary for the performance of the employee's duties but owned/chartered by the employer's customers, be considered a Jones Act seaman.

I.

SEAMAN STATUS

The test for seaman status can presently be summarized as follows:

1. The worker's duties must contribute to the function of the vessel or to the accomplishment of its mission; and

2. The worker must have a connection to a vessel in navigation, or to an identifiable group of such vessels, that is substantial in terms of both duration and nature.

Chandris, Inc. v. Latsis, 515 U.S. 347, 115 S. Ct. 2172, 2190, 132 L. Ed. 2d 314 (1995); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 111 S. Ct. 807, 112 L. Ed. 2d 866 (1991). The present dispute revolves around the second prong of this test and Wisner's connection to an identifiable group of vessels.

II.

THE LOUISIANA SUPREME COURT CORRECTLY FOUND WISNER TO BE A JONES ACT SEAMAN

In the underlying case, the Louisiana Supreme Court correctly focused, not on the specific wording of the above quoted test for seaman status, but rather on the underlying principals that form the clearly articulated and well reasoned foundation for this Court's determination of seaman status. Although a seaman's connection to a vessel in navigation,

or to a group of such vessels, must be substantial in terms of both duration and nature; the purpose of this requirement is to ensure Jones Act coverage to true seamen, while precluding such coverage to land-based workers who have only a transitory or sporadic connection to a vessel in navigation and, therefore, whose employment does not regularly expose them to the perils of the sea. *Wisner v. Professional Divers of New Orleans*, 98-C-1755 at pp. 4-5 (La. 03/02/99) (citing *Chandris*, 115 S. Ct. at 2190).

In analyzing the underlying jurisprudence, The Louisiana Supreme Court recognized that

> [t]he *Chandris* court poignantly stated that in defining the prerequisites for Jones Act coverage, one should focus upon the essence of what it means to be a seaman rather than allowing jurisprudential tests to obscure such a finding. In so doing, the *Chandris* court recommended that the total circumstances of an individual's employment be considered, as the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

Wisner, 98-C-1755 at p. 5 (citing *Chandris*, 115 S. Ct. at 2190-91). Thus the Louisiana Supreme Court correctly concluded that

> *Papai* and *Chandris* dictate that when we determine whether the nature of Wisner's connection to vessels in navigation is substantial, we should focus on whether Wisner's duties were

> primarily sea-based activities. . . . In both cases, the Supreme Court emphasized that the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks.

Wisner, 98-C-1755 at pp. 5-6 (citations omitted) (citing *Harbor Tug & Barge Co. v. Papai*, __ U.S. __, 117 S. Ct. 1535, 1540, 137 L. Ed. 2d 800 (1997); *Chandris*, 115 S. Ct. at 2190-91). It is not the fortuity of one's tenure on various vessels that should be controlling. The Court concluded by stating that

> the formulations or "tests" employed by the various courts are simply different ways to arrive at the same basic point: the Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to "the special hazards and disadvantages to which they who go to sea in ships are subjected."

Wisner, 98-C-1755 at p. 6 (citing *Chandris*, 115 S. Ct. at 2190).

Moreover, the Louisiana Supreme Court also recognized the inherent inequity that exists when employers, such as PDNO, who depend completely on the use of vessels for their work, rely on their customers for the provision of those vessels. The court stated:

> Jones Act coverage should not be withheld . . . when claimants are continuously subjected to the perils of the sea and engaged in classical

> seaman's work. The Fifth Circuit specifically held that, in light of the purposes of the Jones Act, employers will not be allowed to deny Jones Act coverage to seamen by arrangements with third parties regarding a vessel's operation or by the manner in which work is assigned.

Wisner, 98-C-1755 at p. 4 (citations omitted). *See also Folse v. Western Atlas International, Inc.*, 593 So. 2d 341 (La. 1992).

Furthermore, the Louisiana Supreme Court acknowledged that a commercial diver is the quintessential vessel. When a diver is engaged in a dive in navigable waters, he is navigating the waters as any other Jones Act vessel would. Therefore, the Louisiana Supreme Court stated:

> A diver's work *necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land. It is not, like so many offshore field occupations, an art developed in land work and transposed to a maritime setting. Oil field divers who regularly spend days or weeks at a time working, eating, and sleeping on vessels are exposed to the same hazards as other seamen. Moreover, when a diver descends from the surface, braving darkness, temperature, lack of oxygen, and high pressures, he embarks on a marine voyage in which his body is now the vessel. Before he can complete his assigned task, he must successfully navigate the seas. *Wallace v. Oceaneering Int'l*, 727 F.2d at 436. (citations omitted)

Wisner, 98-C-1755 at p. 4 (emphasis and citation as in original).

Finally, the Louisiana Supreme Court recognized that in the present case they were called upon to answer a question that this Court and the United States Fifth Circuit had left for another day — whether an employee hired to perform seagoing work, and who does his work on short voyages aboard a large number of vessels during the employment in question, is a seaman. *Wisner*, 98-C-1755, Calogero, C.J. concurring (citing *Papai*, 117 S. Ct. at 1540), and Knoll, J. concurring (citing *Papai*, 117 S. Ct. at 1540; *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986)).

Thus, after considering the totality of the circumstances, the Louisiana Supreme Court concluded that Douglas Wisner was a seaman based on the following facts:

1. Wisner's work as a commercial diver placed him on vessels for ninety percent of his work life with PDNO; and

2. Wisner's employment as a commercial diver for PDNO was inherently maritime, exposing him regularly to the perils of the sea.

Wisner, 98-C-1755 at p. 6

III.

HARBOR TUG & BARGE CO. v. PAPAI & THE IDENTIFIABLE GROUP OF VESSELS REQUIREMENT

Petitioner complains that the Louisiana Supreme Court's decision in *Wisner* "abrogates" *Papai.* However, this assertion is based on petitioner's mischaracterization of the *Wisner* court's reasoning. Nevertheless, even if this Court were to disagree with the reasoning of the Louisiana Supreme Court, Wisner would still qualify as a seaman pursuant to jurisprudence that remained unaffected by *Harbor Tug & Barge Co. v. Papai*, __ U.S. __, 117 S. Ct. 1535, 137 L. Ed. 2d 800 (1997).

In *Papai*, this Court again reaffirmed the test for seaman status last espoused in *Chandris*, and stated that with regard to determining whether an employee has a connection to an identifiable group of vessels, some element of common ownership ***or*** control by the employer is required. *Papai*, 117 S. Ct. at 1542. *Papai*, involved an employee who attempted to satisfy the common ownership and/or control element by creating a nexus between his union hall, which did not employ him or engage in any job and/or vessel assignments, and various independent employers, each of whom entered into individual employment contracts with the employee and made their own individual and independent job and vessel assignments. ***Papai*, did not** involve a situation, as in the present case, where **a single employer**, for which the use of vessels is an integral component of its business and the employee's duties, **assigned its own employee** to multiple vessels for vessel related jobs.

In *Papai*, the employee sought to have the court consider his employment with those multiple, independent employers, using the union hall as a common link, to establish that he was employed in the service of an identifiable fleet of vessels and therefore a seaman as to his current employer. *Papai*, 117 S. Ct. at 1542. The primary focus of this Court in *Papai* was whether Papai could rely on work done on vessels for multiple employers, pursuant to individual employment contracts with each employer, without any showing of common ownership **or** control as to the vessels. *Cabral v. Healy Tibbits Builders, Inc.*, 118 F.3d 1363, *as amended on denial of rehearing*, 128 F.3d 1289 (9th Cir. 1997), *cert denied*, 118 S. Ct. 1827 (1998). This Court rejected the notion that one could rely on work done for ***multiple employers*** to satisfy the Jones Act's status and fleet requirements with regard to any individual employer and instead focused on Papai's employment relationship with his employer at the time of his accident. *Papai*, 117 S. Ct. at 1541-42. The mere fact that various employers employed employees through a common hiring hall could not provide the nexus necessary to satisfy the requirement of common ownership or control of a group of otherwise unrelated vessels. *Papai*, 117 S. Ct. at 1541.

However, *Papai* is distinguishable from the present case in that *Papai* involves a worker who was employed through a union hall, which merely provided a readily available pool of laborers and played no role in job and/or vessel assignment, by multiple random vessel owners, each of which entered into their own separate employment contract and made their own independent vessel and job assignments. In the present case, Wisner was employed by PDNO as a commercial diver and assigned by his employer, PDNO, to vessels owned by PDNO's customers and essential to

PDNO's business and Wisner's duties. Unlike *Papai*, where the plaintiff had entered into various employment contracts with various vessel owners, Wisner has a single employment relationship with an employer that assigned him to multiple vessels in furtherance of said employer's business.

The requirement of common ownership **or** control expressed in *Papai* is not inconsistent with prior jurisprudence allowing these elements to be satisfied upon a showing that the employer requires the use of vessels in the rendition of services and that the employer relies on its customers to provide said vessels rather than own or charter said vessels themselves. *See, e.g., Folse v. Western Atlas International, Inc.*, 593 So. 2d 341 (La. 1992); *Miller v. International Diving and Consulting Services, Inc.*, 95-873 (La. App. 5th Cir. 2/14/96); 669 So. 2d 1246; and *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237, 1240 (5th Cir. 1986). The present case is similar to that found in *Folse*, *Miller*, and *Pickle*, which were all decided after *Barrett v. Chevron USA, Inc.*, 781 F.2d 1067 (5th Cir. 1986), which required a fleet to consist of "an identifiable group of vessels acting together or under one control." *Barrett*, 781 F.2d at 1074.

The Louisiana Supreme Court and Fifth Circuit have consistently held that where an employer assigns its employees to various vessels that are owned by its customers in furtherance of the employers business, the customer's vessels will constitute an identifiable group of vessels acting together or under one control. *See Folse*, 593 So. 2d 341; *Pickle*, 791 F.2d 1237; and *Wallace*, 727 F.2d 427. It is the individual employer's need for the use of a vessel in furtherance of its business and assignment of its employees to said vessels that provides the common nexus necessary

to satisfy the requirement of common control that is missing in cases such as *Papai*. *See, e.g.*, *Folse*, 593 So. 2d at 343. As a matter of law, an employer cannot deprive its employees of seaman status simply through business arrangements with its customers. *Folse*, 593 So. 2d at 342.

In *Folse*, the court discussed the identifiable group of vessels requirement in the context of an employer who relied on its customers for the furnishing of vessels necessary for the completion of the work that was to be performed. The *Folse* court held that when an employer utilizes its customers' vessels, in lieu of owning or chartering its own, the customers' vessels constitute a fleet. *Folse*, 593 So. 2d at 342 (*citing Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 974 (1984)). In situations such as *Folse* and the present case, where an employer's business requires the use of vessels and the employer chooses to rely on its customers to supply said vessels rather than own or charter said vessels themselves, the courts have treated the employer as the defacto owner/charterer. As a matter of law, an employer cannot deprive its employees of seaman's status simply through business arrangements with its customers. *Folse*, 593 So. 2d at 342.

In *Folse*, the plaintiff's employer provided wireline services to its customers from the customers' vessels. Although the employer in *Folse* never owned or chartered any of the vessels from which its employees worked, it did depend on its customers' vessels to provide its employees with the living quarters and work platforms essential to the accomplishment of its business. Consequently, the *Folse* court determined that the customers' vessels constituted an identifiable fleet (i.e. an identifiable group of vessels under common control).

In the present case, Wisner has alleged injury not only as a result of his last dive from an Exxon platform, but also as a result of previous dives from vessels. Wisner was assigned by PDNO to all of the vessels from which he dove. Moreover, and as in *Folse*, PDNO required said vessels in furtherance of its business and as a necessary component of Wisner's employment. For those jobs from which Wisner dove from a vessel, said vessel was a necessary component of his job, without which he could not have completed his job and PDNO would have been required to provide its own vessel. In the present case, it is the individual employer's need for the vessel in furtherance of its business that provides the common nexus necessary to satisfy the requirement of common ownership or control that is missing in cases such as *Papai*, which involve multiple employment relationships of varying significance with numerous vessels owned by several employers.

As in *Folse*, the situation presented in the present case requires a finding that the vessels from which Wisner worked and upon which he is alleged to have suffered injury be treated as an identifiable fleet. Although PDNO did not own or charter the vessels on which Wisner worked and was injured, they did require and rely upon those vessels for the provision of work platforms and living quarters. Consequently, as in *Folse*, PDNO cannot be allowed to deprive Wisner of seaman status based on its business decision to use its customers' boats.

Finally, the overriding concern expressed by this Court in *Papai* was the importance of "the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act . . . before a particular work day begins." *Papai*, 117 S. Ct. at 1541 (*citing Chandris*,115 S. Ct. at 2187). To this extent, this Court stated:

> The fundamental purpose of th[e] . . . substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

Papai, 117 S. Ct. at 1540 (citing *Chandris*, 115 S. Ct. at 2190) (modifications as in original); *Wisner*, 98-C-1755 at p. 5. "For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." *Papai*, 117 S. Ct. at 1540; *Wisner*, 98-C-1755 at p. 5.

Therefore, the Louisiana Supreme Court's conclusion in the present case that Douglas Wisner is a Jones Act seaman is clearly consistent with this Court's prior decisions regarding seaman status and is in complete accord with the established notions that employees and employers depend upon concerning the predictability of Jones Act coverage. After all, Wisner, as a commercial diver, was a sea-based employee who was regularly exposed to the perils of the sea during voyages upon vessel's to which he was assigned by his employer, PDNO. *Papai*, on the other hand, only had sporadic connections to his employer's vessel and was never exposed to the perils of the sea during voyages. Unlike Wisner, whose employment is clearly sea-based, *Papai's* entire work history with his employer was clearly shore-based.

CONCLUSION

In conclusion, Wisner is a Jones Act seaman. Wisner has claimed injury over a period of time during which he was assigned by his employer, PDNO, to various vessels owned by PDNO's customers. Since these vessels were necessary for the performance of PDNO's business, PDNO exercised the requisite degree of common control necessary to satisfy the requirements of *Papai*. Because *Papai* is clearly distinguishable on its facts, and should be so limited, reliance on *Papai* by the trial court and court of appeals was unfounded, as *Papai* did not effect a change in prior jurisprudence. Therefore, it was proper for the Louisiana Supreme Court to reverse the lower courts and conclude that Wisner is a Jones Act seaman.

Wherefore, considering the foregoing, Respondent, Douglas Wisner, prays that this honorable court deny PDNO's application for writ of certiorari.

Respectfully submitted,

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NO. 98-1908

In the Supreme Court of the United States

October Term 1999

PROFESSIONAL DIVERS OF NEW ORLEANS,
Petitioner,

v.

DOUGLAS WISNER,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY HALLIBURTON ENERGY SERVICES, INC. IN SUPPORT OF PETITIONER

June 24, 1999

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY HALLIBURTON ENERGY SERVICES, INC. IN SUPPORT OF PETITIONER

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

NOW COMES Halliburton Energy Services, Inc., and moves this Honorable Court for leave to file the accompanying *amicus curiae* brief in support of Petitioner, as provided in Rule 37 of the Rules of the Supreme Court of the United States. The consent of the attorneys for the Petitioner has been obtained in writing and a letter of consent has been filed with the Clerk of this Court. The consent of the attorneys for the respondent was requested but said consent was not given.

Halliburton Energy Services, Inc. is an oil and gas

service company engaged in numerous operations on the navigable waters of the United States. As such, the question of seaman status is one of prime importance to the corporation. Halliburton Energy Services, Inc. is licensed to do and does significant business in the State of Louisiana. Accordingly, it is subject to the jurisdiction of the state courts in Louisiana. The decision of the Louisiana Supreme Court in this case has dramatically altered the test for seaman status as it would apply to cases that are filed in state court in Louisiana. Since many of Halliburton 33,000 employees work on the navigable waters of the United States and are subject to coverage under the Longshore and Harbor Workers Compensation Act or the Jones Act, any change in their status has direct impact on the nature and amount of their compensation for injury.

Because the decision in the Louisiana Supreme Court in this case has changed the status of those individuals who were once longshoremen, to Jones Act seamen, any decision in this case would have significant impact on Halliburton.

While Petitioner will concentrate on the particular facts of its own case, Halliburton's brief will deal with the general implications of the need for uniformity in maritime law and the problems that will be confronted with national and international corporations that are subject to jurisdiction in the State of Louisiana which now has its own test for seaman status.

Accordingly, Halliburton Energy Services, Inc. respectfully submits that its Motion to File Amicus Curiae Brief should be granted and that the following and attached *amicus curiae* brief should be accepted by the Court in connection with the captioned case.

Respectfully submitted:

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae[1], Halliburton Energy Services, Inc. ("Halliburton"), respectfully submits this Brief in Support of Petitioner's Application for Writ of Certiorari in Douglas Wisner v. Professional Divers of New Orleans, No. 98-1908.[2]

Halliburton is an oil and gas service company with employees located both in the United States and internationally. Because a substantial amount of Halliburton's work relates to oil and gas exploration offshore and on navigable waters, it is continually confronted with the question of the seaman status of its injured employees. Because Halliburton is subject to the jurisdiction of Louisiana state courts, it has a keen interest in the outcome of this case which established a test for seaman status that would be unique to suits filed in Louisiana state courts. Moreover, because Louisiana has rejected federal forum non conveniens rules for maritime cases, virtually all of Halliburton's maritime business around the world would be affected by this case.

SUMMARY OF ARGUMENT

The Louisiana Supreme Court, ostensibly following United States Supreme Court precedent, has, instead, fashioned its own test for seaman status insofar as it

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[1]Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, counsel verifies that undersigned counsel for amicus authored the brief in whole, and no other person other than amicus curiae, its members, or its counsel have made any monetary contribution to the participation or submission of the brief.

[2]Halliburton has received the written consent of the Petitioner and its letter of consent has been filed with the Clerk of Court. Respondent has not given consent to file this brief.

relates to an employee's connection to a vessel in navigation, or an identifiable group of vessels, that is substantial in both duration and nature. The Louisiana Supreme Court has removed the requirement, established by federal precedent, that an injured worker seeking coverage under the Jones Act have a substantial connection to an identifiable fleet of vessels with a requisite degree of common ownership or control. Instead, the Louisiana Supreme Court has employed a "totality of the circumstances" test granting seaman status to anyone who is "subject to the perils of the sea".

The Louisiana Supreme Court decision has created an irreconcilable conflict with the body of federal jurisprudence and the holdings of this Court, on the subject of seaman status. The holding of the Louisiana Supreme Court in this case violates the principle of uniformity in maritime law.

Because Louisiana state courts will be obligated to follow the holding of Louisiana's highest court, corporations, such as Halliburton, who are subject to jurisdiction in the State of Louisiana ,will be confronted with a different and opposing test for seaman status for litigation proceeding in state court pursuant to the "saving to suitors" clause. Prior to commencement of litigation, employers who are subject to suit in Louisiana will be unable to determine which of the competing state and federal tests for seaman status should be utilized when endeavoring to establish the injured employee's appropriate compensation payments.

The conflict created by the Louisiana Supreme Court in this case goes far beyond the territorial borders of Louisiana. If a corporation is subject to jurisdiction in Louisiana, an injured employee, if a United States citizen, injured virtually anywhere in the world, could still bring suit in Louisiana and avail himself of the different and less restrictive test for seaman status available to him in Louisiana. Status will no longer be determined by a single clear test applicable to all employers and employees.

Instead, a different test would apply simply based upon the employers' amenability to suit in Louisiana.

Because a state court of last resort has decided an important federal question in a way that directly conflicts with the decisions of this Honorable Court as well as several United States Courts of Appeal, the granting of the writ herein is warranted.

ARGUMENT

Halliburton Energy Services, Inc. (hereinafter referred to as "Halliburton") is a Delaware corporation having its corporate headquarters in Texas and is a subsidy of Halliburton Company. Halliburton is one of the world's leading providers of products, services and integrated solutions for oil and gas exploration and production. The company's capabilities range from the initial evaluation of producing formations to drilling, completion, production and well maintenance; either for a single well or an entire field. Halliburton has a global presence with over three hundred service centers in more than sixty countries. Halliburton employs approximately 33,000 individuals nationwide. In addition, many of its employees, who are United States citizens, also work at Halliburton's international locations. Halliburton also has a strong presence in the Gulf of Mexico, working within the territorial waters of states abutting the Gulf and at various locations on the outer continental shelf and elsewhere. Because of its work in the Gulf of Mexico, Halliburton maintains a registered office in New Orleans, Louisiana. Halliburton is licensed and authorized to do business in the State of Louisiana.

Because of the nature of Halliburton's work on navigable waters, its employees are assigned to a variety of offshore locations which can be either fixed platforms, jack-ups, semi-submersible rigs or other offshore exploration and production facilities or vessels. Halliburton's employees are always transported to these

offshore locations by either vessel or helicopter. The nature of Halliburton's work is such that its employees work a variety of schedules of varying duration on vessels and non-vessels alike, as well as periods of time offshore.

In every instance of an injury to a Halliburton employee, once that injury becomes one of lost time, Halliburton must assess and determine the employee's status so that payments under the appropriate compensation scheme, i.e., maintenance and cure, or longshore and harbor workers benefits, can begin. Thus, the question of an injured employee's status is one of paramount importance to Halliburton and its employees. Depending on how that question is answered, it may mean a difference in payments to the injured employee between $15.00 a day until he reaches maximum cure (per the maintenance obligation owed to a Jones Act seaman) or two-thirds of the employee's average weekly wages (under the employer's obligation under LHWCA).

The question of status of injured employees affects not just Halliburton. A cursory review of the oilfield directories of New Orleans, Louisiana and Lafayette, Louisiana reveals hundreds of companies involved in the process of exploration and production of oil and gas off the coast of Louisiana. Thousands of employees retained by these companies work on both fixed platforms and movable rigs and perform every category of work from catering and food services to sandblasting, painting, well testing and wireline services. If injured, these employees are subject to two totally different and antagonistic tests for seaman status as a result of the Louisiana Supreme Court decision in this case.

I.

THE DECISION OF THE LOUISIANA SUPREME COURT HEREIN IS CONTRARY TO DECISIONS OF THIS HONORABLE COURT AND OTHER UNITED STATES COURTS OF APPEAL AND UNDERMINES THE PRINCIPLE OF UNIFORMITY IN MARITIME LAW

The Louisiana Supreme Court in this case has fashioned a test for seaman status that is directly at odds with the precedent established by this Honorable Court and other federal courts. Specifically, the Louisiana Supreme Court, in interpreting the requirement that a putative seaman must have a connection to a single vessel or an identifiable fleet of vessels in navigation that is substantial in both duration and nature, has removed the requirement that the vessel connection must be to a single vessel or a fleet of vessels with a requisite degree of common ownership or control. Because the lower Louisiana state courts will be obligated to follow the holding of its highest court, the test for seaman status will be wholly dependent on whether suit is filed in Louisiana's state courts or elsewhere.

The Jones Act, 46 U.S.C. § 688, establishes a uniform federal law that state as well as federal courts must apply to the determination of employer liability to seaman. Garrett v. Moore-McCormack Co., 317 U.S.239, 244 (1942). It makes the Federal Employers Liability Act (FELA) available to maritime claimants by incorporating by reference "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees." 46 U.S.C. § 688(a). It adopts "the entire judicially developed doctrine of liability" under FELA. Kernan v. American Dredging Co., 355 U.S.426 (1958). More particularly, the Jones Act adopts the "uniformity requirement" of FELA, requiring state courts to apply uniform federal law. Garrett, supra.

This Honorable Court has demonstrated a continuing concern for the uniformity of maritime law and deviations from uniformity have been criticized. Haight, Hon. Charles A., Jr. Babel Afloat: *Some Reflections on Uniformity in Maritime Law*, 28 Journal of Maritime Law and Commerce, 189 (1997); The Lottawanna, 21 Wall. 558, 88 U.S. 558, 575 (1874); Kossick v. United Fruit Co., 365 U.S.731 (1961); Moragne v. States Marine Lines, Inc., 398 U.S.375 (1970).

The decision by the Louisiana Supreme Court, if allowed to stand, would undermine needed uniformity in maritime and admiralty law. There is no question that the Louisiana Supreme Court, under the pretense of following federal jurisprudential precedent, has fashioned a new and different test for seaman status in regard to attachment to an identifiable fleet of vessels. Halliburton respectfully submits that the decision by the Louisiana Supreme Court would lead to absurd and untenable anomalies in maritime cases.

For instance, river pilots that pilot numerous vessels on the Mississippi River in Louisiana would be considered seamen under this decision, if they file suit in state court. This is despite the fact that they were previously held not to be seamen due to their lack of connection to an identifiable fleet of vessels with a common nexus of ownership. Bach v. Triden Steamship Co., 920 F.2d 322 (5th Cir. 1991), *cert. granted, judgment vacated by* 500 U.S.949, *on remand* 947 F.2d 1290 (5th Cir. 1991) *cert. denied*, 504 U.S.931 (1991). However, their brother pilots on other rivers of the United States, employed in exactly the same circumstances, would not be seamen, simply because they could not sue in Louisiana.

II.

THE "SAVING TO SUITORS" CLAUSE ALLOWS EMPLOYEES TO SUE IN STATE COURT, WITH ITS DIFFERENT STATUS TEST, ANY EMPLOYER SUBJECT TO PERSONAL JURISDICTION

Injured employees who would not be Jones Act seaman under the federal jurisprudential test for connection to a fleet of vessels with a common nexus of ownership (all as more fully outlined in the petitioner's brief), would likely file suit in state court in Louisiana for a Jones Act claim under the "saving to suitors" clause. The "saving to suitors" clause, contained in 28 U.S.C. § 1333, setting forth the jurisdiction of the United States District Courts provides in pertinent part,

> "The district court shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled..."

This provision recognizes the concurrent jurisdiction of state courts over maritime claims. See, Williams v. M/V SONORA, 985 F.2d. 808, 815 N.7 (5th Cir. 1993). Also Linton v. Great Lakes Dredge and Dock Co., 964 F.2d 1480, 1484-85 (5th Cir.), *cert. denied*, 506 U.S.975 (1992).

Once in state court, these maritime employers/defendants will be unable to remove these cases to federal court for a determination of the status question, under existing federal and U.S. Supreme Court jurisprudence, without some other independent basis for federal jurisdiction and removal. Courts have consistently interpreted the "saving clause" to preclude removabilty of maritime actions brought in state court, provided there is

no independent basis for removal, such as diversity jurisdiction. Although this Court has not directly held that removabilty is prohibited, lower courts have relied on strongly worded dicta from Romero v. International Terminal Operating Company, 358 U.S.354 (1959), to bar removal in such Jones Act cases in order to preserve the plaintiff's choice of forum. Two courts of appeal have squarely faced the issue and have held that admiralty and maritime claims are not removable to federal court unless there exists some independent basis, such as diversity of parties for federal jurisdiction. See, Servis v. Hillard Systems, Inc., 54 F. 3rd 203, 206-207 (4th Cir. 1995), *cert. denied*, 516 U.S.1084 (1996); Linton v. Great Lakes Dredge and Dock Co., 964 F.2d 1480, 1488 (5th Cir. 1992), *cert. denied*, 506 U.S.795 (1992); In Re: Dutile, 935 F.2d 61, 62-63 (5th Cir. 1991).

III.
THE DECISION OF THE LOUISIANA SUPREME COURT GOES BEYOND THE TERRITORIAL BOUNDARIES OF LOUISIANA

The conflict created by the Louisiana Supreme Court in this case is not limited to the territorial boundaries of the State of Louisiana in that national and international companies such as Halliburton, who do business in the State of Louisiana, are subject to personal jurisdiction in Louisiana. Furthermore, as noted above, because of the saving to suitors clause, the state courts in Louisiana will have both subject matter jurisdiction and personal jurisdiction over corporations such as Halliburton, for injuries that may occur extra-territorially to the State of Louisiana.

The Jones Act is for the benefit of seamen against their employers. The jurisdictional reach of this statute extends where there is a sufficient nexus between the defendant and the United States so as to justify assertion of jurisdiction. United Continental Tuna Corp. v. U.S., 550

F.2d 569 (9th Cir. 1977). Thus, as to United States citizen-seaman, in United States waters, it applies to United States or foreign employers. It has been amended to exclude alien offshore petroleum workers in foreign waters (except those having no remedies under foreign law). While it does apply to United States citizen-seamen injured outside United States territorial waters or for injury claims against foreign employers, its application will depend on the application of a list of factors. See Lauritzen v. Larsen, 345 U.S. 571 (1953); Hellenic Lines, Ltd v. Rhodito, 398 U.S. 306 (1970).

In other words, an accident and resulting injury could occur to an employee on the navigable waters of the United States or, indeed, the world, that would subject corporations, such as Halliburton, to suit in the United States and the State of Louisiana. That injured employee, for example, could have been assigned, as Mr. Wisner, to twelve different vessels owned by ten different entities. As noted earlier, the nature of the offshore service work is such that most employees will have widely varied assignment schedules and varying connections to a group of vessels without a common nexus of ownership or control. Rarely will an employee be assigned to a particular vessel for any great length of time. Nevertheless, most of these same employees will be subject to the "perils of the sea." However, simply because the employer is amenable to suit in Louisiana, that individual could file suit against it and avail himself of the different test for seaman status now employed in Louisiana. In contrast, other individuals, injured under the exact same circumstances and having similar vessel assignments and duties, but not having an employer amenable to suit in Louisiana, would not be considered seamen.

IV.

FORUM NON CONVENIENS IS NOT AVAILABLE TO JONES ACT DEFENDANTS SUED IN LOUISIANA STATE COURT

Once suit for an accident occurring outside of Louisiana commences in the State of Louisiana, with rare recourse for removal, a defendant/employer would have to rely solely on the Louisiana rules pertaining to forum non conveniens to get the case transferred. Unfortunately, for a maritime defendant in Louisiana, there is no available transfer mechanism.

La. Code of Civ. Proc. art. 123, contains Louisiana's rule with respect to forum non conveniens. It provides:

> Art. 123. Forum non conveniens
>
> A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating

> outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> **C.The provisions of Paragraph B shall not apply to claims brought pursuant to 46 U.S.C. § 688 or federal maritime law.**[3]

(Emphasis added). Art. 123 was added by Acts 1970, No. 294, § 1. Amended by Acts 1988, No. 818, § 1, eff. July 18, 1988.

By operation of paragraph B and C, the State of Louisiana commands its courts to entertain the forum non conveniens objection in all federal civil cases except for

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[3]At the time this brief was submitted, the Louisiana Legislature amended parts of this article, and deleted subsection C. The actual effect of the amendment is unknown at this time.

conveniens objection in all federal civil cases except for admiralty, a result deemed ironic by Justice Kennedy in his dissent in American Dredging Co. v. Miller, 510 U.S. 443, 462 (1994). The Louisiana Supreme Court has upheld the freedom of Louisiana courts to reject the federal doctrine of forum non conveniens to maritime suits filed in the state courts. Thus, in Markzannes v. Bermuda Star Cruise Line, Inc., 545 So.2d 537 (La. 1989), *cert. denied,* 493 U.S. 1043 (1990), the Louisiana Supreme Court overturned the application of federal forum non conveniens law and, under local procedure, allowed admiralty claims by a Greek seaman injured aboard a Panamanian cruise vessel en route between Bermuda and Boston to proceed in the Louisiana courts.

In Miller v. American Dredging Co., 595 So.2d 615 (La. 1992), *cert. granted, aff'd sub nom* American Dredging Co. v. Miller, 510 U.S. 443 (1994), the Louisiana Supreme Court again declined to dismiss a case under federal forum non conveniens law and applied its own such law (which exempts maritime claims) to a claim by a Pennsylvania seaman, who was injured on the Delaware River aboard a tug that never plied Louisiana waters, where the only connexity between the seaman's employer -- American Dredging Company, a Pennsylvania corporation principally doing business in New Jersey – was the fact it had a registered agent in Louisiana. Upon certiorari review, this Court affirmed that result, holding that federal law does not preempt Louisiana's doctrine of forum non conveniens in admiralty cases filed in state court under the "saving to suitors clause."

"Because Louisiana has no doctrine of forum non conveniens in maritime cases, a maritime action may be maintained as long as venue is proper and jurisdiction is obtained over the defendant, either in personam or by quasi in rem attachment of its property." Lejano v. Bandak, 705 So.2d 158 (La. 1997), *reh'g denied, cert. denied* (citing Russell v. CSX Transportation, 689 So.2d 1354 (La.1997)). Thus, maritime actors throughout the world

are subject to suit in the state courts of Louisiana on claims arising around the world as long as they have sufficient contacts here for jurisdiction to be had.

V.

BECAUSE OF THE DIFFERENT TESTS FOR STATUS, PRIOR TO LITIGATION, EMPLOYERS WILL BE UNABLE TO DETERMINE WHICH COMPENSATION SCHEME TO UTILIZE FOR PAYMENT TO INJURED EMPLOYEES

If litigation commences in a United States District Court or another state court, employers will naturally follow the precedent of this Court in determining compensation owed to maritime employees. If litigation commences in Louisiana state court, notwithstanding federal jurisprudence, which should have primacy in these matters, state district courts will be compelled to follow the ruling and holding of their highest court. Accordingly, the status test formulated by the Louisiana Supreme Court will be applied in state litigation. Meanwhile, parallel or similar litigation in United States District Courts and other state courts will proceed using a totally different standard for status.

The problem is especially acute in the pre-litigation stage, when an employer must choose which case law to apply in making the initial status determination. If the Louisiana state court analysis is used, many injured employees will be considered seaman that would otherwise not be able to claim that status under federal jurisprudence. The problem for an employer in establishing a claim file for commencement of payment of maintenance or workers' compensation benefits is basically unsolvable. There is absolutely nothing that an employer can look to that would assist it in determining whether a

Wisner analysis should be utilized or the federal jurisprudential analysis used. This is precisely why principles of uniformity in maritime law are required. It is respectfully submitted that this may result in many employers not paying any compensation and forcing the claim to litigation for fear of using the wrong test.

CONCLUSION

It is respectfully submitted that this Honorable Court is the only body that can resolve this currently irreconcilable conflict with the highest court in the State of Louisiana which is at odds with the body of federal jurisprudence interpreting seaman status under the Jones Act. It is for these reasons that it is respectfully submitted that this Honorable Court should grant the Writ of Certiorari and either summarily reversing the Louisiana Supreme court herein or by allowing argument so that matter may be fully briefed and argued. This Writ Application falls clearly within the considerations contained in Rule 10(b) of the Rules of the Supreme Court of the United States.

To say the least, Halliburton submits that the longstanding body of federal jurisprudence interpreting seaman status questions as it pertains to assignment to an identifiable fleet of vessels, having a common nexus of ownership or control, is correct. The conflict that has been created will have serious repercussions for hundreds of corporations engaged in maritime trade that are ameniable to suit in Louisiana.

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